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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA *
*
v. * 06-CV-354-PB
* November 6, 2008
GENERAL ELECTRIC COMPANY * 9:10 a.m.
*
* * * * *

Day 3 - Morning Session
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government: Catherine A. Fiske, Esq.
Peter M. Flynn, Esq.
Laura J. Rowley, Esq.
Donald G. Frankel, Esq.
U.S. Department of Justice

For the Defendant: Peter A. Biagetti, Esq.
William M. Cowan, Esq.
Mintz, Levin, Cohen, Ferris,
Glovsky & Popeo, PC

Ignacia Moreno, Esq.
Thomas H. Hill, Esq.
General Electric Company

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I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
ALBERT C. CLARKE				
By Mr. Biagetti	49			

1 BEFORE THE COURT

2 THE CLERK: Court's in session and has for
3 consideration a Bench Trial Day 3 in the United States
4 of America versus General Electric Company, Civil Case
5 No. 06-cv-354-PB.

6 THE COURT: Let's talk about Exhibit 36.

7 MS. FISKE: Yes, your Honor.

8 THE COURT: The Siebels affidavit supplements
9 the deposition that she gave; right?

10 MS. FISKE: Yes.

11 THE COURT: And the supplemental information
12 is oriented towards certain topics. One topic is
13 Siebels Exhibit 5.

14 MS. FISKE: Yes.

15 THE COURT: The topic we are most interested
16 in is information from employee interviews.

17 MS. FISKE: Yes.

18 THE COURT: I assume therefore that she gave
19 testimony in the deposition about employee interviews.

20 MS. FISKE: Yes, she did, your Honor.

21 THE COURT: Okay. I also am assuming that in
22 paragraph -- the portion of the Siebels affidavit that
23 the parties are fighting about is paragraph five.

24 MS. FISKE: Yes, your Honor.

25 THE COURT: And I'm assuming that the

1 principal statement in there is the statement: He,
2 Metevier, was told by Fletcher that Milford used Pyranol
3 as a defoliant and/or that it was spread on fire lines.
4 That's the key statement; right?

5 MS. FISKE: Correct.

6 THE COURT: And that's what the parties are
7 fighting about; right?

8 MS. FISKE: I believe that's it.

9 THE COURT: You say that statement is
10 inadmissible hearsay.

11 MR. COWAN: Yes, your Honor.

12 THE COURT: You say it's not inadmissible
13 hearsay.

14 MS. FISKE: Correct.

15 THE COURT: Okay. So we know what the focus
16 of the analysis is. Okay. Now, I am going to try to
17 diagram this out for you so that we can try to analyze
18 the problem in a way that's meaningful.

19 If we follow this back to the beginning, what
20 happened was -- I'm going to do it chronologically.
21 What you have is Fletcher allegedly said something;
22 right?

23 MS. FISKE: Yes.

24 MR. COWAN: Respectfully, Judge, it's unclear
25 who --

1 THE COURT: All right. During an interview.
2 I'm going to put in Fletcher was told during the
3 interview by somebody, okay? And it was told to
4 Metevier; right?

5 MS. FISKE: Yes.

6 MR. COWAN: Yes.

7 THE COURT: Okay. Metevier told it to an
8 interviewer; right?

9 MR. COWAN: Yes, your Honor.

10 THE COURT: Interviewer through a report
11 probably told it to Siebels; right?

12 MR. COWAN: Your Honor, you're close.
13 Apparently there were two interviews. Between Metevier
14 and Ms. Siebels, there were two other out-of-court
15 declarants involved.

16 THE COURT: Who were they?

17 MR. COWAN: They were a lawyer for General
18 Electric, who had the first conversation with Mr.
19 Metevier, and then a second lawyer who reviewed
20 information from the first lawyer.

21 THE COURT: And prepared a memo, and that's
22 what Siebels reviewed?

23 MR. COWAN: That's correct, your Honor. Well,
24 I apologize for not being clear for the record. I'm not
25 sure Ms. Siebels reviewed that memo either. I can only

1 attest, as we all can --

2 THE COURT: Well, you put her forward and had
3 her testify about it in the form of a supplemental
4 statement; right? So let's take it -- what you're
5 saying to me is this may be in two steps. You're saying
6 this part of the chain --

7 MR. COWAN: Judge, I am telling you there are
8 two steps between -- after Mr. Metevier.

9 THE COURT: But I'm not sure I understand why.
10 The lawyer who actually interviewed him told some other
11 person who put it into a memo, and that's how Siebels
12 learned of it?

13 MR. COWAN: Your Honor, what I now
14 understand -- and your Honor asked a very good question
15 yesterday that I think we all thought was a good
16 question. I now understand that there was a lawyer who
17 interviewed Mr. Metevier who prepared a report. A
18 second lawyer reviewed that lawyer's report.

19 THE COURT: Okay.

20 MR. COWAN: And eventually we get to the
21 affidavit that's the subject of our disagreement.

22 THE COURT: Why do you say that it --
23 eventually we get to? Your position is that the Siebels
24 statement in the exhibit was based on not the person who
25 actually interviewed Metevier's report, but the report

1 of someone who's reviewed the report that the original
2 interviewer prepared.

3 MR. COWAN: That's correct.

4 THE COURT: Okay. I will add that to the
5 list. Do we agree that that's the chain?

6 MR. COWAN: So the alleged statement by
7 Fletcher, Judge, to Mr. Metevier.

8 THE COURT: Yes. I'm saying Fletcher Paint
9 Works could be anybody. We don't know in your view.

10 MR. COWAN: Very well.

11 THE COURT: Acquired during the course of
12 the -- in tour of Fletcher. That's what you're saying
13 is all we know.

14 MR. COWAN: Yes.

15 THE COURT: They told that to Metevier.

16 MR. COWAN: Yes, that's allegedly, sure.

17 THE COURT: Metevier told it to lawyer one.

18 MR. COWAN: Correct, Judge.

19 THE COURT: Lawyer one prepares a report which
20 is reviewed and summarized in a report by lawyer two.

21 MR. COWAN: That's correct, Judge.

22 THE COURT: Lawyer two prepares a report which
23 Siebels is somehow informed of to the extent she's
24 willing to make a statement under oath that that, in
25 fact, happened.

1 MS. FISKE: And just to clarify, she read the
2 report three or four times according to her deposition
3 testimony.

4 THE COURT: Doesn't matter. I don't really
5 care.

6 MS. FISKE: And it's introduced in her
7 deposition.

8 THE COURT: I don't really care. Do we agree
9 that we have the chain?

10 MR. COWAN: That appears to be the chain as I
11 understand it, Judge.

12 THE COURT: Now, Siebels is a 30(b)(6)
13 witness; right?

14 MR. COWAN: Yes, sir.

15 THE COURT: She is speaking on behalf of
16 General Electric in that capacity; right?

17 MR. COWAN: That's correct, your Honor.

18 THE COURT: Whatever she says is vicariously
19 attributable to GE. It would be the same as if GE
20 itself could speak.

21 MR. COWAN: That's right, Judge.

22 THE COURT: So that step of the analysis is --
23 because you could potentially argue that, well, the
24 ultimate party is GE, but we don't have a problem --
25 nobody doubts Siebels' capacity to make admissions on

1 behalf of GE; right?

2 MR. COWAN: The company designated her as a
3 30(b)(6) witness.

4 THE COURT: Do you agree therefore that
5 because of that, they are designating her as an agent
6 who's authorized to speak on GE's behalf about matters
7 that she's going to be talking about; right?

8 MR. COWAN: Yes, as reflected in the notice of
9 deposition and stipulations of the parties.

10 THE COURT: So we don't have a potential
11 hearsay problem at that stage between GE and Siebels.
12 We have though potential hearsay problems at each of
13 these stages that have to be overcome; right?

14 MR. COWAN: Yes, Judge.

15 THE COURT: And that's -- your problem is that
16 they can't -- some or all of these stages they cannot
17 overcome; right?

18 MR. COWAN: Yes, Judge. One other thing if I
19 may, Judge, and I think you raised this issue. There's
20 also the ultimate issue once you get to Ms. Siebels.
21 Regardless of whether or how -- if the government can't
22 overcome all those hearsay problems, whether Ms. Siebels
23 offered this information as his Honor said yesterday as
24 an adoption of what Mr. Metevier allegedly said or
25 simply a summary or representation of what was said.

1 THE COURT: I want to just go through this
2 step by step now in the reverse order in which I've
3 diagrammed it and find out whether you have a problem or
4 don't have a problem, okay? This first step between
5 Siebels and lawyer two, do you agree that Siebels can on
6 behalf of GE admit that there was an interview conducted
7 of Metevier by lawyers for GE?

8 MR. COWAN: That fact, Judge, yes.

9 THE COURT: That's an admission that's binding
10 on GE; right?

11 MR. COWAN: That there was an interview, yes.

12 THE COURT: And that then covers both step one
13 and step two. There's not a hearsay problem. Siebels
14 can testify and did testify in a summary form in that
15 supplemental affidavit that lawyer two -- you didn't
16 break this out, but you are now agreeing that this is
17 what happened. Lawyer two prepared a report summarizing
18 an interview of lawyer one that was conducted of
19 Metevier, and I admit that all those things are true on
20 behalf of GE.

21 MR. COWAN: That those events occurred? Yes,
22 Judge.

23 THE COURT: So the problem then becomes not at
24 this stage. You agree that those are admissions that
25 are vicariously made by GE that are not hearsay, and

1 therefore there's nothing wrong with her providing that
2 statement in a 30(b)(6) deposition. It would be
3 admissible against GE. Even though she had no personal
4 knowledge that Metevier was interviewed, but she can
5 speak in a way that is an admission by GE about the fact
6 that there was an interview of Metevier. Do you agree
7 with that?

8 MR. COWAN: Yes. Ms. Siebels is predicted to
9 say I can attest that there was an interview of Tony
10 Metevier.

11 THE COURT: That in fact is what she admitted
12 in that affidavit, that there was, in fact, an interview
13 of Metevier by GE; right?

14 MR. COWAN: Yes, Judge.

15 THE COURT: Now, the next step in the process
16 is what did Metevier tell lawyer one? Not whether what
17 Metevier said was true, but the proposition to be
18 established is Metevier told the interviewer A, B, and
19 C. And that's the only thing we're trying to prove; not
20 the truth of A, B, and C, but that Metevier told the
21 lawyer A, B, and C. That, too, is an admission by GE
22 that Ms. Siebels made that's binding and not hearsay.
23 Metevier was interviewed and he said the following
24 things. If that's all you're trying to prove, not the
25 truth of what Metevier said, you don't have a hearsay

1 problem. Do you agree?

2 MR. COWAN: I agree.

3 THE COURT: Okay. So we've worked our way
4 down to what did Metevier say, and we all agree that
5 that is not hearsay. The problem comes in the last
6 stage of the chain here, and it is therefore the
7 question -- and there are two potential truth values in
8 what Metevier was told. One truth value is did, in
9 fact, Fletcher's use this as a defoliant? And it's not
10 admissible for that purpose; do you agree?

11 MS. FISKE: Yes, absolutely.

12 THE COURT: So we can rule that out. It won't
13 be considered to establish the truth of the proposition
14 that, in fact, Fletcher's used Pyranol as a defoliant,
15 okay? So we are left with one other truth statement
16 that is potentially relevant, and that is, that Metevier
17 believed that Fletcher's was using it as a defoliant.
18 Are you with me on that?

19 MS. FISKE: Yes.

20 THE COURT: Everybody agree with my analysis
21 so far? That's the course of dispute. You say that
22 cannot be admitted against GE based on this statement in
23 the supplemental affidavit.

24 MR. COWAN: Yes, and I'd be happy to be heard
25 as to why --

1 THE COURT: Well, I'm going to give you a
2 chance. I'm defining the problem, okay? Because this
3 is a multilevel potentially complicated hearsay problem,
4 and I'm showing you the way a law professor would go
5 about analyzing this so we can get down to the kernel of
6 what the problem is. And I think we have all agreed
7 that the kernel of the problem concerns the
8 admissibility of a statement of belief by Metevier that
9 he made to someone, and everything else in the chain
10 either the government is disclaiming any intent to use
11 it to establish that, in fact, Fletcher did use it as a
12 defoliant; so that's out, and we've all taken out by
13 agreement all the other stages of the analysis. She
14 properly made those admissions.

15 MR. COWAN: Respectfully, Judge, I agree to
16 your hypothesis, although when you give me an
17 opportunity, I'd like to expound on that.

18 THE COURT: Yeah. But I want to know -- I
19 only want to hear from you now is if you disagree with
20 anything I've said to date tell me and tell me why I've
21 gotten it wrong. To date. I don't want to hear the
22 argument about why what Metevier told the interviewer he
23 believed is not admissible. I'm going to give you a
24 chance to talk about that in a minute. I'm trying to
25 clarify the problem. I understand this is now --

1 everybody agrees is not hearsay, shouldn't be considered
2 in the hearsay analysis, and the question here is
3 Metevier's statement of belief to the interviewer.
4 That's the only issue that's up for grabs.

5 MR. COWAN: If I may, within the box you've
6 drawn, Judge, may I just bring to the Court's attention,
7 I don't agree to the extent -- I'm just following the
8 graphic here. Mr. Metevier tells lawyer one A. Lawyer
9 one -- lawyer two reviewing lawyer one's notes
10 interprets that as A plus B, and then that ends up being
11 presented to Ms. Siebels as A plus B. There are
12 problems that I think --

13 THE COURT: I'm having trouble with that
14 because if I had Ms. Siebels in the deposition and I
15 asked her the following questions: Ms. Siebels, prior
16 to this deposition did you review the records of GE to
17 determine whether there are any interview reports of
18 interviews of Mr. Metevier? I did do that, sir. And
19 tell me what those reports said. And she then tells me
20 what those reports said. There is no hearsay objection
21 to her -- what, I'm trying to prove what the report
22 said, for her to say the report said X.

23 And then the next step is, do those reports
24 reflect an actual interview of Mr. Metevier? And the
25 answer is yes, they do, sir. They reflect an interview.

1 According to the interview reports what did -- or,
2 excuse me, not asked that way. What did Metevier tell
3 the interviewer? He told the interviewer that he went
4 on a tour to Fletcher's and was told when he was there
5 that Fletcher's was -- used Pyranol as a defoliant.
6 Objection, hearsay, can't be admitted to prove that
7 Fletcher's did use it as a defoliant. I agree.
8 Sustained. Can't be used for that purpose. Okay.
9 Objection. It shouldn't be admitted at all as to what
10 he believed at the time even if his belief is relevant
11 because his statement of belief at the time is
12 inadmissible hearsay.

13 The fact that it went through two levels of
14 lawyers before it got there is irrelevant because Ms.
15 Siebels is admitting on behalf of GE that this interview
16 was conducted and this is what Metevier said. She's
17 admitting that, and that she learned that on the basis
18 of hearsay is not itself hearsay because if you look at
19 the rule, a statement by a party opponent is not
20 hearsay. Even if it's based on hearsay it is not
21 hearsay. So the statement that she made there is that
22 an interview was conducted and Metevier said that in the
23 interview. She admits that.

24 MR. COWAN: Judge, I respectfully -- and I'm
25 happy to take this up with his Honor. I don't think

1 that is the record, a couple of points you made, Judge.

2 THE COURT: Go ahead.

3 MR. COWAN: You said that Ms. Siebels, if she
4 were at her deposition and she was asked did she review
5 the interview, let the record be clear, Judge, and I
6 don't think his Honor is aware of this, Ms. Siebels was
7 asked a question about Mr. Metevier at her deposition
8 and said she knew nothing about his dealings with
9 Fletcher Paint Works.

10 THE COURT: Yeah. And because she knew she
11 would be potentially -- you guys are potentially subject
12 to sanctions, you didn't tell the full truth, went back
13 and disclosed the full truth in a supplemental affidavit
14 which, in fact, there was, and she would not have been
15 acting in her capacity as a 30(b)(6) person if she had
16 concealed the information in a supplemental affidavit,
17 and that's why she disclosed it; right?

18 MR. COWAN: Well, Judge, I would back it out
19 this way, respectfully. This is not our case. This is
20 another case. And admittedly, GE was a party in that
21 case, and we are talking about GE in this affidavit
22 here. Leading up to this deposition, the parties in
23 that case issued notice of depositions for 30(b)(6) and
24 entered a stipulation concerning those depositions.

25 In that stipulation, which Ms. Fiske presented

1 to the Court yesterday, on page one there is an
2 agreement among the parties that they will share, as
3 part of the 30(b)(6) share with each other other
4 undisclosed information that had not otherwise been
5 disclosed as a result of document requests, depositions,
6 or interrogatories. At no point does it say and we also
7 embrace, adopt, or otherwise grab hold of that
8 information. This is just information relating to --

9 THE COURT: I understand that. But she did
10 admit -- show me the actual questions in the deposition
11 where she was asked about employee interviews.

12 MS. FISKE: Maybe I can cut this short.

13 THE COURT: No, no, no. I run things. Okay?
14 You don't run things. I'm trying to solve a problem.
15 I'm going to solve the problem the way I think I need to
16 solve the problem. You are here to help me solve the
17 problem. Do what I tell you. Show me where the
18 interviews are, the questions in the deposition about
19 employee interviews.

20 MS. FISKE: Turn to slide two, please. And
21 topic 31 says regardless in the stipulation, you are
22 going to provide all the information GE has contrary to
23 what --

24 THE COURT: I don't really care. I'm asking a
25 question. Answer my question.

1 MS. FISKE: Slide two, please. Do you know
2 whether the lawyers interviewed any individuals in
3 connection with preparing these deposition notebooks? I
4 assume any available information regarding interviews or
5 depositions with any of these individuals was used to
6 prepare the document behind this information.

7 That is Siebels' deposition on October 10th,
8 page 24, line 20, to page 25, line 22.

9 THE COURT: Is she asked anything else about
10 the employee interviews in that deposition?

11 MS. FISKE: Yes, she is. Turn to slide three.
12 On October 10th, continuing on, page 109, line 3, do you
13 know whether GE interviewed Mr. Metevier? Objection.
14 At any time in connection with the sales of scrap
15 Pyranol to Fletcher's? Answer, I am personally aware of
16 information pertaining to other sites, but I am not
17 aware of information that was collected from Metevier
18 for this site. Does that answer the question you asked?

19 THE COURT: Okay. Anything else from that
20 deposition that bears on the specific question that I've
21 asked you?

22 MS. FISKE: Yes. On page 86, the following
23 day, she's asked a question about what information has
24 been reviewed, and on page 86, line 7, I believe there
25 is going to be additional information provided to you

1 from GE's outside counsel regarding everything that is
2 included behind Tab 31.

3 THE COURT: Okay. It seems to me clear that
4 this supplement, which was confusing to me when I saw
5 it, now in context I understand. After reviewing the
6 deposition, the GE lawyers, who well knew what -- these
7 interviews, recognized that her answer was at best
8 incomplete and misleading if not supplemented, and they
9 determined that in order to comply with her obligations
10 as a 30(b)(6) deponent, that they needed to provide
11 additional information. This additional information is
12 stated under oath and is the equivalent as if she had
13 given it as an answer to the questions that are asked,
14 and they are admissions by GE of whatever it is she
15 admitted.

16 In my view what she admitted was there were
17 interviews of Metevier and this is what they said. She
18 didn't admit that what was said in the interviews by
19 Metevier was true, and the admissions that come by her
20 status as a party opponent ends there. Does everybody
21 agree with that? She did not admit whether what
22 Metevier said in the interviews was true, and therefore
23 you can't rely on admission by a party opponent to
24 establish the truth of what Metevier said in the
25 interviews.

1 And he said one thing that the government is
2 not trying to offer it for. That is, I was told that
3 Fletcher used these things as a defoliant, because you
4 are relying on the statement of mental state or belief
5 exception to the hearsay rule, and that would go beyond
6 that exception to justify the admission of the document;
7 right.

8 MS. FISKE: Yes.

9 THE COURT: The statement. Okay. So what you
10 are arguing is that Metevier -- that statement is
11 admissible not to prove that Fletcher did, in fact, do
12 this, but to prove that Metevier believed that he did.
13 Right?

14 MS. FISKE: Yes.

15 THE COURT: Okay. So we are focusing on the
16 mental state exception to the hearsay rule and whether
17 your statement is admissible under that exception or
18 not.

19 MS. FISKE: That is correct.

20 THE COURT: Do you have -- and that's where I
21 think we should be focusing our discussion. Do you have
22 some argument as to why the analysis should not be
23 focused on that stage of the discussion; that it should
24 not be focused on whether this statement is admissible
25 under that exception to the hearsay rule?

1 MR. COWAN: I don't have an argument of why we
2 should focus on that, Judge, absolutely not. I just
3 don't want to lose sight of when we still get back to
4 Ms. Siebels what that representation in that affidavit
5 means beyond an admission that the company was aware of
6 this interview.

7 THE COURT: And this is what it said.

8 MS. COWAN: And this is what it said.

9 THE COURT: No, it goes one step further.
10 That, in fact, an interview was conducted and, in fact,
11 this is what Metevier said. Because it's possible that
12 somebody in the company could have made up an interview
13 that didn't occur, but she's representing that, in fact,
14 there was an interview with Metevier and this is what
15 Metevier said. And that is an admission by GE, that
16 there was an interview and this is what he said.

17 Now, what he said is not relevant unless you
18 can establish that it's relevant to establish his mental
19 state or to establish the ultimate truth of what he said
20 happened. You're not offering it for the latter. You
21 are focusing on the former. So our discussion boils
22 down to a consideration of is this statement admissible
23 under the mental state exception to the hearsay rule.
24 Okay? Everybody with me on that?

25 All right. Now we can go back up and analyze

1 that problem, which is itself I think a relatively
2 simple problem. The problem was getting there because
3 of the many layers of potential hearsay that we have to
4 deal with.

5 Okay. Now, here's the problem I have with the
6 government's analysis. And you can tell me where I'm
7 off the track here.

8 MS. FISKE: Your Honor, there's another way to
9 look at it besides --

10 THE COURT: Let's look at it this way first
11 because you are arguing that; right? Are you arguing
12 that way? If you're not, I will just go on. Are you
13 arguing it that way? If you are, let me address that,
14 and if you're not and abandoning that, I will go on to
15 the other argument.

16 MS. FISKE: I'm not addressing that, your
17 Honor.

18 THE COURT: So you're not arguing mental
19 state.

20 MS. FISKE: I'm arguing that it's not hearsay
21 at all because it's not being admitted for the truth of
22 the matter asserted. It's not even hearsay. It's not
23 an exception to hearsay.

24 THE COURT: What are you admitting it for?

25 MS. FISKE: Not the truth of the matter.

1 THE COURT: I'm not asking you what you are
2 not admitting it for. I'm asking what are you admitting
3 it for? It's relevant because it tends to prove --
4 answer that sentence. Finish that sentence.

5 MS. FISKE: What he was thinking.

6 THE COURT: That's being admitted for the
7 truth of what he says he was thinking. Otherwise, it's
8 clearly being admitted for the truth. So that argument
9 is wrong. That's so basic. They wouldn't need a mental
10 state exception to the hearsay rule if people's
11 statements about what they believed were not admitted
12 for the truth. That's why you have an exception to the
13 hearsay rule for then existing emotional or physical
14 condition; mental, emotional, physical condition.

15 MS. FISKE: Right.

16 THE COURT: You're trying to prove that at
17 that time Metevier believed something; right? Otherwise
18 we've wasted a lot of time here. You're trying to show
19 because he was engaged in an agreement with Fletcher
20 about transferring Pyranol, you want to try to prove
21 that it was an agreement for disposal, and you want to
22 prove that at the time he believed that they were
23 putting it into the ground, because if he believed that,
24 it supports your claim that the arrangement was an
25 arrangement for disposal because putting it on the

1 ground is clearly disposal as defined in the statute.

2 So you're trying to prove what Metevier
3 believed at the time, and the truth of his statement to
4 the interviewer about what he believed at the time is an
5 issue, and ordinarily they would be entitled to have
6 Metevier in here to be cross-examined about whether he,
7 in fact, believed that or not. Is it possible you
8 acquired that belief way later? Are you sure you aren't
9 confusing it with another company? Are you lying
10 because you have some incentive, some grudge against GE?
11 There are a million reasons why they would want to be
12 able to have the truth of that statement tested through
13 cross-examination, and you have to demonstrate a reason
14 why it doesn't have to be. And the reason that appears
15 to me -- I thought you were arguing -- is 803(3), then
16 existing mental, emotional, or physical condition.

17 And I mean, the idea that admitting a
18 statement for a proposition, the truth of which is in
19 dispute, what did Metevier believe at the time, and then
20 telling me I'm not admitting it for the truth. I'm
21 admitting it trying to show what Metevier believed.
22 Where what Metevier believed is the truth proposition
23 that is in dispute, see, that's classic hearsay, and it
24 has to come within an exception, and the potential
25 exception is 803(3). But there's a problem with 803(3),

1 I think. My law clerk's read your stuff. I didn't read
2 it yet, so I'm doing this all on my own.

3 But it seems to me the problem is that it is
4 true that there is an exception to the hearsay rule, a
5 statement of the declarant's then existing state of
6 mind, but it's qualified, but not including a statement
7 of memory or belief to prove the fact remembered or
8 believed. And what Metevier at the time of the
9 interview was testifying about his state of knowledge at
10 the time is a statement about what he remembers or
11 believed at the time, and it doesn't appear to qualify
12 to me under 803(3). That's what I think.

13 MS. FISKE: What about looking at -- I
14 understand what you're saying. So we can set that
15 aside. What about looking at simply --

16 THE COURT: If they had asked her, for
17 example, in the deposition, if they had asked Siebels,
18 I'm asking you as a 30(b)(6) deponent what did Metevier
19 understand at the time? If she had said Metevier
20 understood at the time that this was going to be used
21 for defoliant, that would be an admission by GE because
22 you can have -- I've asked my clerk to give me a case
23 because I haven't done the research on this, but it is
24 my belief -- if I'm wrong, you should correct me because
25 you don't want me to make an erroneous ruling here that

1 might lead you to appellate ground.

2 It's my belief if you look at the language of
3 the admissions rule, a statement by a party is defined
4 as not being hearsay, and it is a statement by a party
5 even if the statement is itself based on hearsay. And
6 since she was speaking as a party, if somebody had
7 gotten her to say Metevier believed that this was used
8 as a defoliant, that would be an admission. But
9 paragraph five does not do that. Paragraph five simply
10 says there was an interview. It was conducted of
11 Metevier. This is what Metevier said. And I don't
12 think she goes so far as to say, and what Metevier said
13 was accurate.

14 And therefore, it's not an admission by her of
15 what Metevier said was accurate. It's a statement about
16 what Metevier believed at the time, and that statement
17 of belief has to qualify under an exception to the
18 hearsay rule because it's being admitted for the truth,
19 what Metevier believed, and it's a statement he made
20 about a belief he had in the past. And a statement
21 about what you believed in the past is not a statement
22 of -- a statement of mental or emotional or physical
23 condition. And therefore I don't see another exception
24 to the hearsay rule under which it's admissible.

25 MS. FISKE: Thank you for your thoughtful

1 consideration of the issue. I have nothing further to
2 say on that.

3 THE COURT: All right. It's a complicated
4 problem because it's so multilevel. I think when you
5 get down to it, that's what it boils down to and that's
6 what the problem is.

7 MR. COWAN: I agree, Judge. Thank you.

8 MS. FISKE: There's another related document
9 -- I move to admit that portion of the Siebels exhibit,
10 paragraph two.

11 THE COURT: I don't think there's objection to
12 two, is there?

13 MR. COWAN: No, your Honor. At this point
14 with respect to the Siebels exhibit, we were objecting
15 to --

16 THE COURT: Paragraph five.

17 MR. COWAN: Relating to the Metevier
18 statement. I believe at the close of yesterday Ms.
19 Fiske raised the issue of the reconciliation, and we
20 have no objection to that.

21 THE COURT: So that will be admitted. What
22 won't be admitted is paragraph five.

23 MS. FISKE: Well, there are portions of
24 paragraph five.

25 THE COURT: That would be admissible if they

1 are relevant, but he was interviewed and -- but the rest
2 of it doesn't seem to be really in dispute. I mean,
3 what GE paid for this and who they paid for that, I
4 don't know that there is any real dispute about that, is
5 there? I don't think there is.

6 MS. FISKE: No, there isn't.

7 MR. COWAN: No.

8 THE COURT: That can come in because it's not
9 really disputed. The disputed statement is the
10 statement about what Metevier believed after he left his
11 interview -- his tour of the Fletcher Paint Works.

12 MS. FISKE: I'd also like to introduce a
13 related exhibit, which is Exhibit 35.

14 THE COURT: All right. Is there objection to
15 that?

16 MR. COWAN: Yes, there is, Judge. And just to
17 make it real, real brief for his Honor, our objection
18 here is his Honor raised the issue yesterday at the
19 close of day two --

20 THE COURT: Excuse me. Could you tell them to
21 do something with the heat in this room here?

22 MR. COWAN: Thank you, your Honor. I thought
23 it was me.

24 THE COURT: No, it's like 90 degrees in here.

25 THE CLERK: It's in all the courtrooms.

1 THE COURT: Call down to the clerk and tell
2 the clerk I can't work in this environment. I'm soaked
3 with sweat. I'm not a physical laborer. Go ahead.

4 MR. COWAN: Very briefly, Judge, our objection
5 here is -- and I will take his Honor back to the end of
6 day two when we first began to broach these topics when
7 you asked a question specifically about Siebels'
8 affidavit, which we've now dealt with, when a 30(b)(6)
9 offers information, is a 30(b)(6) offering it as an
10 adoption or just as a summary?

11 Exhibit 35 is on its face a summary of witness
12 depositions and interviews over the course of many
13 years.

14 THE COURT: What was it? What is it?

15 MR. COWAN: It is a document as best as we all
16 know I think -- and we sort of all assumed together was
17 prepared by prior counsel for my client in relation to
18 what I think is known as the contribution action, a
19 dispute between private parties related to this site,
20 and it does reflect a lawyer's take on deposition and
21 witness interviews over the course of a number of years.

22 THE COURT: Did they make the tragic mistake
23 of sharing this with a witness and therefore it came
24 into evidence because they shared it with a witness?

25 MR. COWAN: Well, I cast no aspersion on --

1 THE COURT: I don't know when this was. Years
2 ago people did make that mistake. I don't think they
3 make it now because they know they lose the work product
4 privilege if things are used to prepare somebody for a
5 deposition.

6 Just because it comes in, it's marked as you
7 reviewed this in connection with your deposition, they
8 need more to show me that it would be adoption by her.
9 So is there some kind of statement where she was
10 presented it and said is this -- what's in this summary
11 true and correct as far as you know? Is there anything
12 like that?

13 MS. FISKE: Yes.

14 THE COURT: Let's hear the questions and
15 answers that bear on that and then I will hear you.

16 MR. COWAN: Thank you, Judge.

17 MS. FISKE: Your Honor, there's a citation in
18 the memo. The pleading I filed, Docket 78, to the
19 citation where this memo is sponsored by Jill Siebels,
20 the 30(b)(6) deponent, and my recommendation would be
21 that this come in -- it's a lengthy memo. It's 30
22 pages. It's a summary of GE's position on the history
23 and that you take it and apply the same principles to it
24 that you've applied today.

25 THE COURT: Showing me that there is this

1 document in existence doesn't show me anything. I need
2 you to take me through the chain by which you say it
3 qualifies as an admission by GE.

4 MS. FISKE: Absolutely, your Honor. Okay.
5 Let's start with Exhibit 64 which is the -- this is the
6 notice of the deposition, and can we go to page two, and
7 the stipulation regarding the topics that will be
8 discussed at the deposition.

9 THE COURT: Is there a set of questions where
10 this was asked?

11 THE CLERK: What volume is 64?

12 THE COURT: Exhibit 64?

13 THE CLERK: It's four books.

14 MR. COWAN: Judge, Exhibit 64 is 2,200 pages.

15 MS. FISKE: There is a complete set right
16 there. That's a replica of the way it was presented.
17 All those exhibits were introduced during her
18 deposition.

19 THE COURT: Does anybody think the finder of
20 fact should review those 2,200 pages and be familiar
21 with them before they decide the case?

22 MS. FISKE: No.

23 THE COURT: Then it shouldn't be an exhibit,
24 so it's not coming in.

25 MS. FISKE: I just brought that for

1 demonstrative purposes.

2 MR. BIAGETTI: Judge, I'm not going to give
3 you the weekend to do it.

4 MS. FISKE: I'm not asking you to do it, your
5 Honor.

6 THE COURT: I understand. It's within the
7 things that were produced in response to the 30(b)(6)
8 notice. That's what you are telling me.

9 MS. FISKE: Exactly.

10 THE COURT: Was she questioned about it?

11 MS. FISKE: Extensively.

12 THE COURT: Show me the question that you
13 think best qualifies as a statement by her that what is
14 in here is true. Not that it is what it is, but what is
15 true because her merely saying is that a document that
16 was in the GE files? Yes. That might help you as a
17 predicate to get it in as a business record or some
18 other means by which you get it in as an admission, but
19 that it came from GE by itself doesn't mean that it's
20 admissible.

21 MS. FISKE: Correct. She was asked to testify
22 on this topic, which is 31, which is the topic that I
23 have on the screen now. What material was transferred,
24 sold, or disposed from any GE plant to Fletcher's?

25 And that information ultimately is contained

1 in what is known as Tab 31E of her deposition, and she
2 is prepared to testified regarding all the information
3 behind Tab E, and she comes to sponsor that information.
4 She has no personal knowledge. She's only reviewed this
5 memo which was prepared by Ropes & Gray for her to
6 testify. She reviews it three times. She spends a day
7 with her lawyers going through it and is prepared to
8 testify on this information contained in this one memo
9 that they call the preparatory memo behind Tab 31E. And
10 the lawyers say repeatedly throughout the deposition she
11 has no personal knowledge of it, but she's prepared to
12 sponsor it as the information that GE has available on
13 the topic that I have here on the screen, which is, you
14 know, what material --

15 THE COURT: Show me something where she says
16 what's here is true rather than this is in our files.
17 Because I would expect Ropes & Gray would carefully
18 prepare her to say I don't know whether that's true or
19 not. I don't have any personal knowledge of it. I can
20 only tell you that you asked me to bring what was in our
21 files on these topics and these are the things in our
22 files.

23 MS. FISKE: It's exactly the analysis that you
24 went through. It's everyplace in the memo where it
25 says: Scrap Pyranol was generated in the process of

1 making capacitors as opposed to Metevier heard scrap
2 Pyranol was generated in the process.

3 THE COURT: Show me where she adopted it
4 though. Producing a summary volume -- can I ask her did
5 she produce this document as her initial response, or
6 did somebody ask her what did you review in preparing
7 this deposition, and they forced out of her this thing
8 that the lawyers thought was work product.

9 MR. COWAN: Your Honor, I believe in the
10 course of her deposition that they've designated, which
11 I'm sure counsel will provide or has provided already,
12 but my understanding of what happened on that day, this
13 witness sat at the deposition. Questions were asked of
14 her, and they said what is GE's knowledge or information
15 about the following topics? And she said I don't have
16 personal knowledge, but I have a document that says
17 these people have been deposed, these people have been
18 interviewed, and this is what they say.

19 THE COURT: Show me the question and answer.
20 It depends on the question and answer. It's one thing
21 to say I have the following records. I don't know
22 whether they are true or not. I'm not representing that
23 they are true on behalf of GE. I'm just representing
24 that we have these things. And it's another thing to
25 say as GE's representative I assert that the following

1 things are true.

2 MR. COWAN: To his Honor's point, and,
3 respectfully, I think this is where Ms. Fiske is
4 struggling with here, the question you called for is not
5 in this deposition. At various times this witness is
6 asked questions and she says this is what I know based
7 on what I have been told in preparation for this
8 deposition.

9 She does not say I accept it or I adopt it as
10 truth. She says this is what the company has learned,
11 acquired, or come to know as a result of depositions.

12 By the way, Judge, many of those same
13 depositions are before his Honor in the way of
14 deposition designations. Some portions of which are
15 reflected in this memo, I don't believe the government
16 has actually designated for the purposes of this trial.
17 So there are a number of issues here.

18 But to Ms. Fiske's point, yes, at this
19 deposition this witness said, I offer this to answer
20 these questions of what the company knows, the
21 undisclosed information or what we know about these
22 topics. I don't adopt them. I don't accept them as
23 truth. She says, I have no personal knowledge. This is
24 what I understand we know today about these topics.

25 THE COURT: This is really weird. Again, I

1 don't understand -- it's hard for me to understand this.
2 I assume when I see this that this was something that a
3 lawyer would have prepared and ordinarily thought of as
4 work product, and ordinarily in today's world would
5 never show it to a witness but would instead hold it in
6 his hand and ask the witness a lot of questions about it
7 so that the witness would never be able to say that I
8 reviewed that document and therefore waived the work
9 product privilege when I took my deposition. And
10 certainly you wouldn't see a 30(b)(6) deponent coming in
11 before being asked any questions and saying let me give
12 you a document which constitutes my views on this
13 subject.

14 If it is that, then maybe it is admissible,
15 but I need somebody to show me the point in the
16 deposition where they behave in that kind of irrational
17 way.

18 MS. FISKE: Can you go to the deposition on
19 October 10th, page 94. There's an extensive discussion
20 of this on the record. Start at line 8. Mr. Storer is
21 the lawyer for GE.

22 (Pause.)

23 THE COURT: All right. She is sponsoring the
24 information, and in that sense it is more like a
25 response to an interrogatory, which is an admission,

1 than a response to document request, which is only an
2 admission that I have the document. This is an unusual
3 circumstance, but she is being offered as a sponsor of
4 this information on behalf of GE according to that
5 excerpt, and unlike the other case where she was not
6 purporting to testify that Metevier was told this thing,
7 here she's being told I want to be as helpful as I can,
8 and on behalf of GE I'm sponsoring this information even
9 though I have no information -- no knowledge of the
10 truth of the information myself, and GE as a company
11 worked hard to put this all together and give it to me
12 so that I can be the sponsor of it. And that looks like
13 an admission of what is in the document. So where am I
14 wrong in that?

15 MR. COWAN: Well, your Honor, to the extent
16 it's an admission, if your Honor is there, it's an
17 admission of what is in the document, which is that
18 these individuals were deposed. This is what they said
19 in the deposition.

20 THE COURT: I see it as qualitatively
21 different when she talks about being not the sponsor of
22 the documents, but the sponsor of the information. And
23 this is a document that was not a preexisting document.
24 The document itself was created to aid her in providing
25 information to the litigants, and it looks to me -- I

1 think a way to think about it is is it -- is she making
2 a response to documents, in which case everybody agrees
3 -- the person who produces documents is not making an
4 agreement that everything in the documents is true. Or
5 is she responding to information? What happened? You
6 put all kinds of things in interrogatory answers that
7 are based on hearsay, but they are admissible against
8 you. They are admissions by you. Do you agree with
9 that? An interrogatory response is an admission.

10 MR. COWAN: I agree, Judge.

11 THE COURT: Okay. So this looks like an
12 interrogatory response given in a deposition that we
13 prepared this information and are giving it to you.

14 MS. FISKE: And, your Honor, I completely
15 agree with you. I think this does contain a mixture,
16 this memo, of both types of information according to the
17 principles that you've outlined earlier with respect to
18 Siebels where some of it you are going to find
19 admissible and some of it you will find hearsay.

20 THE COURT: Tell me what things you want me to
21 credit in this document because first -- if you want me
22 to read it all, it's going to take me half an hour to do
23 that.

24 MS. FISKE: Well, I've given you 35A, which is
25 a highlighted version, to direct you to the portions of

1 the document that I think are most relevant, and I don't
2 think --

3 THE COURT: Where is that?

4 MS. FISKE: You can sort of flip through it to
5 show him.

6 MR. COWAN: Your Honor, I'd object to that on
7 the same grounds, respectfully.

8 MS. FISKE: The relevant portions that I think
9 you will find interesting, and my recommendation would
10 be that you take it under advisement and admit those
11 portions of what you find to be a binding 30(b)(6)
12 admission as compared to those portions of it that you
13 may find fall more within the principles of the reasons
14 why you excluded the statement from Mr. Metevier on
15 behalf of it.

16 MR. COWAN: Your Honor, if I may, I'm at a
17 disadvantage here. I don't have a highlighted version.
18 I'm not sure what Ms. Fiske is suggesting to you is
19 relevant as not admissible in the document. Thank you.

20 MS. FISKE: I'm not suggesting that the entire
21 thing --

22 THE COURT: It will take you 15 or 20 minutes
23 to read through this and it would take me that long,
24 too; so I will have to deal with it at the next break
25 and you can read it and we can talk about it. But my

1 inclination is to say that when a witness is produced in
2 a 30(b)(6) deposition, and in the unusual circumstances
3 provided here, the company to aid her testimony prepares
4 a summary of facts and she is presented as a sponsor of
5 that document, she is representing to the parties that
6 these facts are true and they are admissions by the
7 company in the same sense as if she had made these
8 responses to an interrogatory.

9 Now, it's possible in an interrogatory to
10 refer to a document and not admit the contents of the
11 document, but in the context of that question and
12 answer, it appeared that this is a representation by her
13 that these are GE's beliefs as to what the facts are,
14 not these are GE's belief as to what the documents are
15 because it's not simply a reference to documents. It's
16 a narrative discussion of facts.

17 MS. FISKE: Yes, your Honor, we agree with
18 that.

19 MR. COWAN: Your Honor, if I may, as you
20 consider this issue, can I direct you to another portion
21 of the same deposition which I think may bring this
22 issue into clarity for his Honor and perhaps moves us in
23 a different direction, respectfully. And that is, on
24 page 20 where the witness herself has been asked a
25 question about what this document is and she answers, as

1 opposed to Ms. Fiske's testimony which are lawyers
2 talking to each other.

3 In this case the question starting at line 6
4 on page 20 of that deposition, question, what is your
5 understanding of what the memo is supposed to represent?
6 The witness answers, my understanding is that it
7 represents all the information that GE has available
8 regarding Issue No. 31 which pertains to transportation
9 and disposal of material at Fletcher's Paint site,
10 period.

11 Nothing therein suggests that we believe this
12 information to be truth. It's simply the information
13 that we have available on this topic, no more, no less,
14 Judge.

15 THE COURT: This is so weird. It is so weird.
16 Geez, I'm getting up on 30 years of practicing law.
17 I've never seen anything like this.

18 MR. COWAN: I haven't been at it quite that
19 long, Judge, but I have to admit, I'm with you on this
20 one. But, again, this has been offered by this witness
21 as simply the information available to a company and not
22 an adoption of that information or acceptance of the
23 truth of any of it.

24 And finally I will say this, Judge, because I
25 know you wish to move on. The document is replete with

1 lawyer summary deposition testimony, most of which will
2 be presented to his Honor in the form of designation and
3 some of which I respectfully suggest are not being
4 presented by the government, and this document may be
5 the means by which they are trying to get through the
6 back door evidence they otherwise can't.

7 THE COURT: Well, I don't want to hear anymore
8 about it. What I want you to do is by the next break
9 give me, each of you, just the excerpts of her
10 deposition that purportedly refer to this document
11 because I will try to understand what it is. If you
12 read it, it looks to me like GE prepared it because it
13 wants to win a coverage claim and -- its insurance
14 coverage case.

15 MS. FISKE: I think it's that as well as a
16 contribution case against ABS and Sprague.

17 THE COURT: They brought both insurers and
18 contributions?

19 MR. COWAN: I understood it to be a
20 contribution case. I'm not sure about the insurance.

21 THE COURT: Not insurance coverage, it's a
22 contribution action? I used to do a lot of those. I
23 did CERCLA contribution actions and I did environmental
24 insurance coverage cases, and I did them for years
25 before I came to the court. That was my principal

1 practice area. I would never have done anything like
2 this, but I think that what lawyers are trying to do in
3 those circumstances is they are trying to deal with a
4 problem almost unique to environmental cases where quite
5 often you're trying to prove things that happened many,
6 many years ago where the sources of evidence are very
7 difficult to identify, and it looks like what the
8 company did here was instead of providing answers to
9 interrogatories, GE tried to put together a narrative
10 description of the facts as it understood them so that
11 it could advance the ball in the contribution action and
12 present it.

13 There would be no purpose for GE to just say
14 here's what we think about the facts, but we don't know
15 whether what we think is right or wrong. That's not
16 what litigants do. Litigants either present, here are
17 the documents, and we are not telling you whether they
18 are truthful or not, or they present here's what we
19 think happened in which they are making representations
20 about what happened.

21 You're saying this is kind of a hybrid thing
22 where they tried to produce documents and then gave a
23 nice, helpful, annotated, narrative discussion of what
24 the documents all say. That's something lawyers never
25 do for the other side unless they are trying to

1 represent what their view of the case is.

2 MR. COWAN: Your Honor, I agree with you, it's
3 an unusual situation.

4 THE COURT: It might be used in a settlement
5 brochure or something, but to produce it in a 30(b)(6)
6 deposition, it's difficult to understand what it could
7 be other than an admission.

8 MR. COWAN: Other than the witness's
9 respectful testimony is simply a presentation of the
10 information known, and your Honor with the passage of
11 Ms. Fiske pointed you to, even there the lawyer --

12 THE COURT: I will tell you what you are going
13 to do. First of all, I will only admit the portions
14 that are highlighted. Second, I'm going to tell you to
15 go through the highlighted portions at the lunch break
16 and identify every portion of the highlighted portions
17 that you really dispute because I suspect that most of
18 them you won't really dispute. But I suspect that
19 embedded in this twenty pages of analysis, there are
20 probably three or four things that are really
21 problematic to you that you don't want me to admit.

22 And at least we can focus on what the real
23 problems are because I suspect you won't disagree with a
24 lot of this stuff and -- because I don't know why GE
25 would put it together, take the time to put it together

1 and produce it to the other side, unless it wanted the
2 other side to believe this is what happened. Why else
3 do you do it? To try to mislead them? You collect all
4 this information, produce this narrative description,
5 and then say we are throwing it out there, but you
6 decide whether it's good or bad. I can't think of any
7 case in which a lawyer would behave that way.

8 MR. COWAN: Your Honor, now with the
9 highlighted version, I agree, I think we may get there a
10 lot quicker. Thank you.

11 THE COURT: All right. Let's focus on that.
12 All right. What else are we going to do?

13 MR. FLYNN: Your Honor, I have three exhibits
14 that I'd like to talk to you about.

15 THE COURT: All right.

16 MR. FLYNN: And I'm just bringing these up
17 because these three exhibits have been objected to by
18 General Electric on relevancy grounds. And the first
19 one is Government Exhibit 10. This is a memo prepared
20 by GE dated October 29, 1970, that discusses what
21 happened over the past two years as far as their
22 arrangements with Monsanto trying to return scrap
23 Pyranol, and there is a list of four different items,
24 what it would cost to send it back to Monsanto and a
25 couple of ways to get it back to Monsanto, storage at

1 their site, and also shipping it off for incineration.
2 And the relevance of this is it goes again to this rough
3 time period, the problems and the options that GE had
4 the same material that it was shipping to Fletcher's.

5 THE COURT: All right. Do you want to say
6 something?

7 MR. BIAGETTI: Just that the operative word
8 there is rough time period even if you believe it's a
9 full two years from when written. That gets you back to
10 October of 1968. That's after all of our time in
11 question.

12 THE COURT: I agree, it's minimally relevant.
13 I don't think it will play a role in my analysis. Your
14 objection is overruled. What's next?

15 MR. FLYNN: Next documents are two related
16 documents, your Honor. One is Document No. 48. This is
17 a certified complaint from the New York State Department
18 of Environmental Conservation for an action against GE.
19 I believe it was filed in 1975, and turning to page
20 FTR000061, the fourth paragraph, this is a complaint
21 that was basically alleging that GE --

22 THE COURT: There's no dispute about that, is
23 there?

24 MR. FLYNN: Well, I think the dispute is
25 that -- and it's really sort of an inferential issue,

1 your Honor. This is not a major issue in the case, that
2 GE's -- between their expert and some of their
3 inferences is that they had such low cost or no cost
4 alternatives that the material really -- giving it to
5 Fletcher was a useful product such as they could
6 discharge it into the Hudson without risk, and even
7 though this was filed in '75, our position is that there
8 were some laws on the books as alleged by New York
9 State --

10 THE COURT: I don't think it's proved. So
11 you're offering it to try to prove that GE couldn't
12 lawfully dispose of it in the river and therefore had an
13 incentive to have it go to Fletcher.

14 MR. FLYNN: Not exactly that strong a
15 statement. There was at least a risk that they were
16 violating then existing environmental laws as reflected
17 in the complaint that was filed in '75.

18 THE COURT: I don't think -- that somebody
19 complained against them doesn't prove that they were.
20 That somebody complained against them in '75 doesn't say
21 anything about whether they would have complained
22 against him in '65. The way to prove that is more to
23 establish what the legal requirements were at the time
24 and that they would have been in violation of them, and
25 that's not established by this. It's established by

1 showing me the laws on the books at the time, and as a
2 matter of law I can conclude that. I also think it's a
3 waste of my time. That's not the theory under which you
4 are going to prevail. It's one of those, again, sort of
5 esoteric --

6 MR. FLYNN: It's more of a counter theory.

7 THE COURT: Yeah, I know. It's so far down
8 the line in importance, that it's not worth my time to
9 struggle over. I wouldn't decide in your favor on the
10 basis of that argument. So your request for admission,
11 their objection to it is sustained. The document won't
12 be admitted, and I'm telling you, if I did admit it, I
13 wouldn't credit that argument and rely on it and rule in
14 your favor in any event. So my ruling I think is
15 inconsequential. Okay. What else?

16 MR. FLYNN: Well, I guess the second document
17 is related to that which is actually an internal opinion
18 by the Administrative Court finding.

19 THE COURT: Same ruling.

20 MR. FLYNN: All right, your Honor. Thank you.

21 THE COURT: What's next? Any other documents,
22 government, before it rests its case?

23 MR. FLYNN: No, your Honor. I believe all the
24 documents have already been admitted or --

25 THE COURT: Have you offered and gotten into

1 evidence by agreement all the exhibits you intend to get
2 in, or have you had me rule on any objections to
3 exhibits that you wanted to get in but are objecting to?

4 MR. FLYNN: Other than the one that your Honor
5 spent a significant amount of time with, I think that's
6 the only remaining document.

7 THE COURT: I will reserve judgment on that
8 until after the lunch break to give the parties a chance
9 to try to focus the analysis on it. With that, the
10 government rests.

11 MR. FLYNN: Yes, your Honor.

12 THE COURT: Anything else? Ready to go?

13 MR. BIAGETTI: We're ready to go. GE calls
14 Albert Clark.

15 ALBERT C. CLARK
16 having been duly sworn, testified as follows:

17 THE CLERK: You may be seated. Please state
18 your name and spell your last name for the record.

19 THE WITNESS: Albert C. Clark. Last name is
20 C-L-A-R-K. And that's Albert with an A.

21 DIRECT EXAMINATION

22 BY MR. BIAGETTI:

23 MR. BIAGETTI: Good morning, Mr. Clark.

24 THE WITNESS: Good morning, Mr. Biagetti. How
25 are you?

1 MR. BIAGETTI: I'm fine, thank you. We've
2 met. I'm advised that the microphones are directional;
3 so if you can get your voice pointed towards the
4 microphone, I think that will help everybody. And very
5 seriously, I know that this is not your first encounter
6 with the case; so we all thank you for your time.

7 THE WITNESS: You're certainly welcome.

8 Q. What was your first encounter with litigation
9 involving Fletcher Paint?

10 A. First I heard of it was in 1991. I was
11 working for General Electric in Syracuse, New York, and
12 I was invited for an interview right there at the GE
13 plant in Syracuse, New York. It was in regard to my
14 analogy of what had happened at Hudson Falls dealing
15 with Fletcher Paint Company.

16 Q. And did you participate in that interview?

17 A. I did.

18 Q. What was it?

19 A. I had no preparation for it, so I was
20 interviewed for what I knew of the arrangement between
21 Hudson Falls and Fletcher Paint Company.

22 Q. Did you come to understand at some point that
23 that's what we called a deposition?

24 A. Yes.

25 Q. Under oath?

1 A. At the time I didn't know it was a deposition.
2 I called it an interview. I was very confused as far as
3 what the objective of the interview was, and then
4 afterward I realized that they would actually use it as
5 a deposition.

6 Q. Did you review any documents to prepare you
7 for it?

8 A. There were nothing to review ahead of time.
9 There were no documents and there were no discussions
10 with anyone beforehand.

11 Q. Other than being invited --

12 A. I went in cold you might say.

13 Q. Did you have any preparation with anybody from
14 GE prior to that?

15 A. No, I did not.

16 Q. When, if at all, was the next time that you
17 encountered lawsuits involving Fletcher Paint?

18 A. About a year later. The first one was October
19 of 1991. In November of 1992 I was invited -- requested
20 to appear for a deposition in the GE plant located in
21 Ft. Edward, New York, which is part of the capacitor
22 department, and that was a deposition.

23 Q. How is it that you can remember it was
24 November 1992?

25 A. I'm sorry?

1 Q. How can you remember that it was
2 November 1992?

3 A. Documents that have refreshed my memory.

4 Q. Since then?

5 A. Since then, absolutely.

6 Q. Have you seen the transcript of the
7 deposition?

8 A. I saw the transcript of that deposition in
9 2007.

10 Q. Did you review any documents about Fletcher's
11 Paint prior to that deposition?

12 A. No, none.

13 Q. Did any lawyers or others from GE help to
14 prepare you for that deposition?

15 A. No, none.

16 Q. Did you see any documents regarding Fletcher
17 Paint at the deposition?

18 A. Yes, I did.

19 Q. Were they of any help to you?

20 A. Yes, they did. The documents at that time
21 dealt with ledgers, documents of sales of material to
22 Fletcher's Paint Company by Hudson Falls-GE.

23 Q. And after the 1992 deposition, when, if any,
24 was your next encounter with lawyers for the litigation
25 involving Fletcher Paint?

1 A. I was still working at the Syracuse plant. At
2 the time our division had been purchased by
3 Lockheed-Martin. So I was a Lockheed-Martin employee at
4 that time, and I was requested to go to a review meeting
5 in Syracuse in a conference room, and at that meeting
6 there was a lawyer for GE environmental programs. Her
7 name was Bonnie Harrington, and she had some documents
8 that had been discovered and she wanted to make sure
9 that I knew about them and asked me if they were -- if I
10 recognized these documents.

11 Q. And do you remember about when that meeting
12 with Bonnie Harrington was?

13 A. It was 2001. It was close to May. It was
14 close to May of 2001 because I saw some other dates on
15 documents that backed that up. So I would say mid-2001.

16 Q. Do you remember what documents -- just
17 generally, could you tell the Court what documents you
18 remember, if any, that you saw at that time.

19 A. I do remember them. There were four letters.
20 They were correspondence -- they were internal memos
21 written by GE's accounting people. A lot of those were
22 in the 1967 time period. There was a letter from
23 Fletcher, who was the president of Fletcher's Paint
24 Company, and there was a letter that I had authored
25 pertaining to the case that I wrote in 1968.

1 Q. After that encounter, when, if ever, was the
2 next time you met with lawyers or had anything else to
3 do with the litigation involving Fletcher Paint?

4 A. In 2006 I was contacted by a lawyer from St.
5 Louis representing GE. His name was Eric Barry and he
6 wanted to review the case. He wanted to do it by a
7 telephone interview. He sent me the transcripts of the
8 1992 deposition, not the 1991 document, but the 1992
9 document, highlighting several paragraphs, sentences
10 that he had questions about. So I had time to prepare
11 by reviewing that document, and we had about a one-hour
12 telephone interview to bring him up to date and clarify
13 some questions that he had.

14 Q. And other than that conversation with Mr.
15 Barry and until your arrival here, any other encounters
16 with GE lawyers?

17 A. Yes. About a year after that in 2007, the
18 same Mr. Barry called me and informed me that the
19 responsibility for the case is being transferred from
20 one legal firm to a second legal firm, and he wanted to
21 meet with me with a representative for the new legal
22 firm, which was your firm, and Ms. Levin, and that was
23 Jeffrey Porter. So Jeffrey Porter and Eric Barry came
24 to my home in Manlius, New York, and we talked about the
25 case. We talked about the deposition and facts of the

1 case as we knew them at that point.

2 Q. Between the meeting with Mr. Porter and your
3 arrival here, any other meetings with lawyers or any
4 other encounters regarding the Fletcher litigation?

5 A. This year, 2008, I had got a telephone call
6 from a person -- her name was Addy Fiske, F-I-S-K-E, and
7 this was a telephone message. I didn't speak with her.
8 I got a telephone message on my answering machine. And
9 she wanted me to call her to set up a deposition about
10 what I knew about the case dealing with Fletcher's and
11 GE and Hudson Falls.

12 As I was requested to do, I put in a call to
13 Jeff Porter and informed him of that call, and Jeff told
14 me not to return the call, that the legal firm would
15 take care of it. And so that was my next involvement
16 with the case.

17 Q. After that, I understand there was one more
18 deposition; is that right?

19 A. Yes, right.

20 Q. And prior to that deposition, did you review
21 any documents or meet with anybody in preparation?

22 A. Yes, I did. I met with you, Peter Biagetti.

23 Q. What documents did you see then?

24 A. We saw all the documents. Most of them I had
25 seen at some time, but we were able to put all the

1 documents together for the first time, and in the
2 process that I was going through in all this time is to
3 refresh my memory of all these things that had happened
4 over the 40-year time from 1968 to 2008. So it was a
5 relearning process and putting things in perspective.

6 Q. And then I think you were deposed sometime
7 after that in 2008?

8 A. June 24th in Syracuse I was deposed.

9 Q. Have you been -- where do you live?

10 A. Manlius, New York.

11 Q. And have you been reimbursed for your travel
12 and your time spent in the efforts you just talked
13 about?

14 A. Minimal payments for lost time, and any direct
15 out-of-pocket costs I was reimbursed for.

16 Q. Any portion of that payment influencing your
17 testimony here today, sir?

18 A. Absolutely no way at all.

19 Q. Or at the three depositions you gave?

20 A. The last ones have not been influenced, nor
21 has this one this morning.

22 Q. Between the time that you talked about that
23 first interview in 1991 until today, have you had any
24 conversations with GE employees about Fletcher's Paint?

25 A. No one. No GE employee have I had a

1 conversation.

2 Q. How many years did you work at GE?

3 A. Total time between General Electric and the
4 successor company, Lockheed-Martin, 38 years.

5 Q. And can you briefly give the Court a sense of
6 the jobs you held?

7 A. Yes, I can. I graduated from high school in
8 Pittsfield, Massachusetts. That was my hometown. I was
9 accepted on the GE apprentice drafting training program,
10 which is one of the better training programs. That was
11 a four-year program, which was a combination of
12 classroom, engineering subjects, and on-the-job training
13 actually on -- in drafting rooms doing drafting
14 training. That's four years. Graduated in 1957 from
15 that.

16 I worked as a draftsman for about a year doing
17 drafting, detail drafting, checking for their production
18 drafting department. I had an opportunity in 1960 --
19 right around 1960 or '61 I had an opportunity to take a
20 position -- a temp position as a facility planner in
21 plant engineering for that same department in
22 Pittsfield, and we planned construction work,
23 rearrangements and scheduling and all the detail work
24 that has to go into supporting that department's
25 program.

1 After I was on that job for two years, there
2 was an opening in the purchasing department for a
3 construction buyer, and with my background in
4 construction planning in plant engineering, I was able
5 to get a promotion to the construction buyer's job,
6 again, still at the same ordinance department in
7 Pittsfield, Massachusetts. It was because I was
8 experienced with construction work, when GE got a
9 contract with NASA to develop and support NASA's Saturn
10 rocket program in Mississippi, they assigned people from
11 General Electric to that operation called the
12 Mississippi Test Support Operation, and I was one of the
13 individuals transferred down there. It was a start-up
14 kind of position just to get the thing started. I did
15 transfer to that department, moved the family. I was on
16 that job two years.

17 Q. So what year are we up to now roughly?

18 A. It started in 1963 and ended in 1965.

19 Q. What was your next job?

20 A. In 1965 I had an opportunity to take a senior
21 buyer's job in Hudson Falls, New York, with the
22 capacitor department, and I started on that job December
23 of 1965. It was understood that that would be about a
24 two-year job assignment. The manager of materials used
25 that position to bring new employees into the department

1 and with a plan to transfer different sections within
2 that department. So I knew when I started the job that
3 it would be about a two-year job. As it turned out, it
4 went a little bit longer than that. It went two years
5 and eight months. I left that job in August of 1968.

6 Q. You mentioned a manager of materials in that
7 job?

8 A. Mr. Abbe.

9 Q. Was he your boss?

10 A. He was my boss, A-B-B-E.

11 Q. We'll come back to that stint, but very
12 briefly, why don't you just finish up and tell us about
13 the jobs, if any, you had at GE after that one.

14 A. Okay. After the senior buyer, indirect
15 material, I changed functions, still at Hudson Falls. I
16 went into the manufacturing information systems
17 organization and I worked as a specialist planning
18 systems information, manufacturing information systems,
19 finding requirements and actually implementing the
20 systems, and that was another two-year kind of thing.

21 While I was in that position, an opening came
22 up in Waynesboro, Virginia, GE and they were looking to
23 hire a manager of manufacturing information systems. I
24 was interviewed for that job and I did get that job. I
25 transferred again, staying within GE, but now moving to

1 Virginia, Waynesboro, Virginia, to get that -- a new
2 function established down there in manufacturing
3 information systems. By this time we were now in 1973
4 starting down there.

5 And in 1977 they had a reduction in forces and
6 basically eliminated what I had been doing there, and I
7 ended up leaving the company for three years. When I
8 came back to GE, it was in 1981, and my former boss in
9 Hudson Falls knew of an opening in Syracuse, New York,
10 in the military electronics department.

11 I came back to work in 1981 as a manager of
12 manufacturing information systems. Between 1981 and
13 when I retired from Lockheed-Martin in January 1995, I
14 had several jobs, all of which were in the area of
15 materials management, either for systems or for
16 stockroom operations or for inventory control, and
17 basically when I retired from Lockheed-Martin, I was in
18 a manufacturing information systems position as a
19 specialist. And that was the end of my 38 years.

20 Q. Thank you. You know that our focus today is
21 going to be on that time from '65 to '68 when you were
22 the indirect buyer at Hudson Falls.

23 A. I understand that.

24 Q. Can you briefly describe what your job
25 responsibilities were as an indirect buyer?

1 A. Yes, I can. The easiest way to understand the
2 responsibilities is to picture the division of all the
3 material services, subcontracts that were required for
4 that whole department, to break it down between indirect
5 and direct. So first I will tell you what I was not
6 responsible for.

7 I was not responsible for the procurement of
8 any direct material; that is, material that goes into
9 the capacitor products. I was responsible for all of
10 the procurements, maintenance repair, operating
11 supplies, and services for the Hudson Falls/Ft. Edward
12 operations of the capacitor department. That was my
13 responsibility, and the list of things that I purchased
14 is too long to get into. It was everything.

15 THE COURT: What years again were you at
16 Hudson Falls?

17 THE WITNESS: I started in Hudson Falls in
18 1965, December of '65, and I left there in 1973.

19 THE COURT: Where in Hudson Falls is the
20 plant?

21 THE WITNESS: It's right on Main Street. It's
22 down the falls -- the falls of -- Hudson Falls on the
23 Hudson River.

24 THE COURT: So it's right on the river?

25 THE WITNESS: Yes, it is.

1 THE COURT: During that period of time was the
2 area built up or rural? What was the area like?

3 THE WITNESS: It was an old established
4 village.

5 THE COURT: So you say a village. Where do
6 you live now?

7 THE WITNESS: Manlius Village, out near
8 Syracuse.

9 THE COURT: I don't know your area; you don't
10 know mine. When you say a village, a small community of
11 houses with maybe a few stores and then the plant down
12 there by the falls itself?

13 THE WITNESS: That's correct.

14 THE COURT: I'm trying to think. I was
15 through Hudson Falls in the last couple weeks. I'm
16 trying to remember. There's a Main Street and then
17 there's a street you go sort of down below the Main
18 Street. Is that where the plant was?

19 THE WITNESS: Yes, that's exactly where it
20 was. That's where I worked.

21 THE COURT: Okay.

22 THE WITNESS: My office was there. Even
23 though I was responsible for the operation in Hudson
24 Falls, and if you take -- south of Hudson Falls is Ft.
25 Edward North. That was the other plant I was

1 responsible for operations.

2 THE COURT: Okay.

3 Q. BY MR. BIAGETTI: Back to job responsibilities
4 for a minute. Did you have a staff?

5 A. I had a small staff. I had a junior buyer, I
6 had an expediter, and I had a clerk, and the work was
7 divided among the four of us. Typically the more
8 routine tasks were handled by the buyer and the
9 expediter. Clerical work was handled by my clerk. The
10 major purchases and subcontracts I handled myself
11 personally.

12 Q. When you say you handled them, what do you
13 mean?

14 A. I was responsible for getting competitive bids
15 and placing purchase orders, negotiating contract
16 prices, etc.

17 Q. Can you talk a little bit about the paperwork
18 that fell within your department, please?

19 A. Well, obviously the volume of paper was
20 processing of vendor invoices, reviewing them, getting
21 them approved, and passing them on to accounts payable
22 to pay the vendors for material that we purchased. We
23 also placed purchase orders. So you talk about
24 paperwork, all our purchase orders at that time were
25 paper purchase orders that were typed up and sent to

1 suppliers.

2 Q. Did your department do any actual billing?

3 A. No, we never did any billing. We prepared
4 paperwork for our accounts payable, accounts receivable
5 organization which is part of general accounting.
6 Actually it's interesting you mention billing. The
7 majority of what our activity involves invoicing -- not
8 invoicing, but receiving invoices from our suppliers and
9 processing those for accounts payable to pay our
10 vendors. A small portion of it was, because we dealt
11 with outside vendors and outside customers, if we bought
12 things from an outside customer or if we sold things to
13 an outside customer, that paperwork also went through
14 our office and passed on to accounts receivable portion
15 of general accounting.

16 Q. And among that paperwork that passed through
17 during the time that you were in charge of the
18 department, was there any paperwork regarding Fletcher
19 Paint?

20 A. Yes, there was.

21 Q. Can you explain what that was?

22 A. Yes. Part of the responsibility for the
23 senior buyer of indirect material was to do the
24 administrative work to maintain agreements, contracts,
25 with the sale or disposal of scrap material, surplus

1 material, any materials that had out used its useful
2 life to GE, and one of the reasons that was set up quite
3 a ways before I got there, several years before I got
4 there, was with Fletcher's Paint. The person that I
5 succeeded, the buyer, Mr. Robert Keeney, explained to me
6 the arrangements that had been ongoing for several
7 years.

8 Q. And what did you understand the arrangements
9 with Fletcher Paint to be?

10 A. There was an agreed upon price, and at the
11 time I had no need to know what it was, but it was all
12 documented in a contract that was at my disposal if I
13 needed to look at it. We had an open-ended contract
14 with Fletcher's Paint for a fixed price per drum. We'll
15 talk about that, what is a drum, later, but we had a
16 longstanding agreement that he would purchase this
17 material from us; not only purchased it, but actually
18 come and pick it up himself, to take as much of it as he
19 could use, as much of it as he needed, and as much as we
20 were able to provide what -- the quantities that he
21 needed. So there was nothing in the agreement as far as
22 any maximum quantities, any minimum quantities, or how
23 much he agreed to take over time. It was whatever was
24 usually available and required by Fletcher's Paint.

25 Q. You said it was documented in an agreement.

1 Did you ever see the agreement?

2 A. I never saw it because I never had reason to
3 look at it. I knew where it was. There was a filing
4 cabinet and I remember it being pointed out to me that
5 it had many agreements in it, and Fletcher's agreement
6 was in there. It was a document -- at the time I knew
7 it had been in existence for several years. I've
8 subsequently learned that actually the agreement was
9 made and was executed starting in 1956, which was --
10 again, that was ten years, nine or ten years before I
11 was there.

12 Q. And did you have any understanding of what the
13 history of the arrangement with Fletcher had been quite
14 aside from the terms of the agreement?

15 A. Oh, yes. Even though our department was
16 responsible for administering the agreement and the
17 paperwork and making sure that all the T's were crossed
18 and I's were dotted, etc., I was in constant contact
19 with our scrap yard foreman supervisor, Mr. Varnum, Ed
20 Varnum, and it was his -- either Mr. Varnum himself or
21 one of the employees who worked for him communicated
22 with Fletcher as far as we've got some more, can you use
23 it, can you come get it.

24 And if they could come get it, they would send
25 their truck. Fletcher would send their truck, their

1 driver, and pick up the material that he could take on
2 his truck, get a receipt for it. He'd need that receipt
3 to take the material off the property, and a copy of the
4 receipt is the piece of paper that our clerk would
5 process to request billing for a bill to be sent to
6 Fletcher. There was no pattern to the timing of when
7 they would come and get it. It was strictly worked out
8 between Fletcher's people and our foreman of scrap and
9 salvage.

10 Q. You mentioned these receipts that got copied
11 to your department?

12 A. Yes.

13 Q. Did Fletcher's truck need a copy of the
14 receipt to get off of the premises?

15 A. That's the only way he could leave the plant.
16 He had to have a receipt for what he had on the truck.

17 Q. Was there ever a time that you were a buyer
18 that you understood that Mr. Fletcher or his crew had
19 taken Pyranol away for free?

20 A. No, absolutely not.

21 Q. Or without one of those receipts?

22 A. Couldn't do it.

23 Q. You mentioned Ed Varnum. What kind of contact
24 did you have with Mr. Varnum during your time?

25 A. During the two and a half years, there were

1 many things that were his responsibility that he and I
2 worked on together. Mr. Varnum reported to Mr. Abbe, as
3 did I report to Mr. Abbe. So anything that had to do
4 with scrap or salvage material movement, it was Mr.
5 Varnum and myself who would discuss the situation. If
6 there were any problems, it was always my responsibility
7 to be informed of the problems and contact the vendor or
8 the customer or whatever the case may be to try to
9 resolve it.

10 Q. Did you ever hear any such problems with
11 Fletcher Paint in 1966, sir?

12 A. 1966 things were going very smoothly. I
13 really can't recall any need to get involved in 1966.

14 THE COURT: Can I ask you, during the entire
15 time that you were there, did GE have an arrangement
16 with any other purchaser of scrap Pyranol other than
17 Fletcher's?

18 THE WITNESS: No.

19 THE COURT: Would you have known about it if
20 there were such an arrangement?

21 THE WITNESS: Yes, I would.

22 THE COURT: So it's safe to say that during
23 the entire time you were there, the only person that
24 bought scrap Pyranol from GE was Fletcher.

25 THE WITNESS: Was Fletcher, yes, sir.

1 Q. BY MR. BIAGETTI: Do you recall whether GE
2 during the time you were there had any other
3 arrangements to sell scrap to folks?

4 A. Oh, yes.

5 Q. Can you give an example?

6 A. I can't give you the names of the dealers, but
7 one of the most common sale of scrap or surplus would be
8 scrap metal that we would always get reimbursed for
9 scrap value for: Aluminum, copper, steel, material that
10 was typically remnants of what we needed to make
11 capacitors out of.

12 THE COURT: Can I ask you, to your knowledge
13 or if you know about this, was the entire inventory of
14 scrap Pyranol of GE during the period you were there
15 acquired by Fletcher, or was there some of it that was
16 not acquired by Fletcher?

17 THE WITNESS: There were quantities that he
18 had not taken when I was there.

19 THE COURT: Do you have any knowledge about
20 what happened to that Pyranol --

21 THE WITNESS: No, I don't.

22 THE COURT: -- that he did not take?

23 THE WITNESS: No, I don't.

24 THE COURT: It's fair to say it wasn't sold by
25 GE.

1 THE WITNESS: I can't answer that question
2 either way.

3 THE COURT: I think you just told me earlier
4 if there was a customer for it and there was an
5 arrangement by which it was sold to somebody other than
6 Fletcher, you would know about it, and you have no
7 knowledge of that.

8 THE WITNESS: I have no knowledge of that.

9 Q. BY MR. BIAGETTI: Did you have any knowledge
10 what kind of customer Fletcher was?

11 A. He was a good customer.

12 THE COURT: Excuse me. Sorry to keep asking
13 back and forth, but as things occur to me, I want to ask
14 you. Did you know what GE paid for Aroclor?

15 THE WITNESS: No. That was a direct material
16 buyer.

17 THE COURT: I see. So you would just have no
18 knowledge.

19 THE WITNESS: I have no idea.

20 THE COURT: Do you remember how much -- I
21 think you answered this, but I'm not being sure, but I
22 want to be clear. Do you know how much Fletcher was
23 paying for the scrap Pyranol it was acquiring from GE?

24 THE WITNESS: At the time while I was on the
25 job, I honestly didn't know -- need to know what was

1 being charged. The documentations that I saw more
2 recently showed the price that he was buying it at. So
3 I do know what the price was.

4 THE COURT: So based on records that were
5 shown to you in preparing for the case but not based on
6 your personal knowledge?

7 THE WITNESS: Right, yes.

8 Q. BY MR. BIAGETTI: Given your general
9 responsibilities at the time, Mr. Clark, why do you say
10 you didn't need to know how much GE was charging
11 Fletcher?

12 A. It was an ongoing process. The material was
13 being sold, and as long as the process was working and
14 nothing went wrong with it, there was no need to get
15 involved in an understanding. If there was a need to
16 know, all I had to do was look in the folder, but I
17 probably would have just checked with the clerk and said
18 how much are we selling this for? She could have told
19 me because she sees the receipts. She would have told
20 me it's \$3.75 a drum. But I didn't have any need to
21 know that.

22 Q. You mentioned Fletcher was a good customer.
23 Why do you say that?

24 A. Oh, yes. Along the time of ten years,
25 twelve years of material being sold, picked up, a good

1 relationship with Mr. Varnum's organization, Mr. Varnum
2 many times commented how good it was to work with
3 Fletcher as far as his reliability and trouble-free
4 dealings with the company.

5 Q. You mentioned working with Mr. Varnum and I
6 think you said -- one more question about Fletcher as a
7 customer. There's a term that's come out in the case
8 earlier called "cash in advance." Were you familiar
9 with cash in advance relationships that GE had at the
10 time?

11 A. Not at the time. Again, documents that were
12 discovered included a company-wide policy advice, if you
13 will, of payment terms for different contractors, and it
14 would say certain customers are okay to pay and bill.
15 Other customers they advised cash in advance. Fletcher
16 Paint happened to be on that list where they recommended
17 to have them pay in advance, cash in advance, CIA.

18 Q. At the time, however, do you recall knowing
19 what the terms were for Fletcher Paint?

20 A. No, I don't; no, I don't.

21 Q. Fair enough. You mentioned Varnum, and I
22 think you said he was in the scrap department?

23 A. Scrap and transportation.

24 Q. Thank you. Had you any dealings during your
25 time in indirect buying with the facilities department?

1 A. Oh, yes.

2 Q. What did they do?

3 A. They did all the maintenance. They are
4 responsible for all of the scrap -- trash removal,
5 garbage removal, all the services that we end up having
6 to pay for, and our involvement was to work with
7 facilities so that we understood what scrap dealers,
8 trash dealers, garbage haulers that we were dealing
9 with, that the amounts of monies that we paid for the
10 service were the lowest possible for our business.

11 Q. And did you during your time in indirect
12 buying have some dealings with the facilities
13 department?

14 A. Oh, yes. If we had -- give you an example.
15 If we had something that came up that was a new item or
16 new service required, our department would work with
17 facilities to try to find the best vendor to provide
18 that disposal service.

19 Q. Let me show you a document that the government
20 showed his Honor I believe yesterday.

21 MR. BIAGETTI: Can we turn on the overhead?
22 Mr. Clark, if you would prefer to have old-fashioned
23 paper, we can get you that, too.

24 THE WITNESS: No, this is fine. I'm adapting
25 very nicely to the electronic age.

1 MR. BIAGETTI: I have no doubt that you are.
2 Your Honor, this is Exhibit 16. I believe it's already
3 entered, Defendant's Exhibit 16.

4 Q. Mr. Clark, it's a document that has General
5 Electric at the top and it's dated March 13th, 1968.
6 It's from R.T. Abbe to C.R. Zecchini at quality control
7 with a couple of copies noted to other people in the
8 right-hand corner. You've seen this document before?

9 A. Yes, I have.

10 Q. I'm trying to zoom in on a bit of it where Mr.
11 Abbe says at the first paragraph, we are quietly burying
12 ourselves in scrap Pyranol. Do you see that?

13 A. I see that.

14 Q. Then he goes on to ask Mr. Zecchini for advice
15 regarding the dangers of this material into a landfill
16 dump. He talks about that this would be accomplished
17 via a normal dumpster operation. Do you see that?

18 A. I see that.

19 Q. Did you see this letter, first of all, at
20 about the time it was written in March of '68?

21 A. No. I saw this in 2008, June 24th, at the
22 deposition in Syracuse.

23 Q. I appreciate that, but at the time did you see
24 it?

25 A. No, I did not see it.

1 Q. Was it sent to you, a copy to you?

2 A. No, it was not.

3 Q. It was copied I notice to a Mr. or Ms. Bramer,
4 Dewart, and Moss. Do you see those names?

5 A. I know the people. Kurt Bramer was the
6 manager of facilities at the time, and Mr. Moss, Jim
7 Moss, was the supervisor of maintenance facilities.

8 Q. The department you talked about before?

9 A. That's right.

10 Q. So here's a memo during the time that you are
11 in indirect buying dealing with the sale of scrap
12 Pyranol, and it's talking about scrap Pyranol, in
13 particular, the landfill dumping of it. Why weren't you
14 copied on it, do you know?

15 A. It was not my responsibility at all. Going
16 back to what I had mentioned before as far as what my
17 responsibilities, if we are selling something and
18 receive funds for that something, whatever it is, I
19 would be involved. Purchasing would be involved in
20 that. If we are just disposing of materials, that is,
21 scrap in the case of trash or garbage, and in this case
22 Mr. Abbe was just trying to investigate possible
23 alternatives to selling Pyranol. If we weren't selling
24 the scrap Pyranol, he was just trying to -- from what I
25 read in the letter, he was trying to get information and

1 advice from our manager of quality assurance, Mr.
2 Zecchini, as far as what are the rules and regulations
3 for disposal.

4 Q. You just mentioned what the responsibilities
5 of the indirect buying department were at the time. At
6 the time did the department have business goals?

7 A. Yes.

8 Q. What were they?

9 A. We were charged with maintaining the highest
10 level of profitability for the department by minimizing
11 the costs to the department for an acceptable level of
12 quality, and that had to do with whether we were buying
13 something for the department or selling something to
14 some other customer. We were always involved in bottom
15 line profitability of the department, and we made
16 significant contributions to that.

17 Q. Any responsibility for customer relationships?

18 A. Absolutely, customer relationships.

19 Q. And when you say absolutely, what do you mean?

20 A. That's always a consideration on everything we
21 did.

22 MR. BIAGETTI: I'm on to a new area, Judge.
23 I'm happy to keep going.

24 THE COURT: My reporter needs a break. We'll
25 take a 15-minute break.

1 (Recess taken.)

2 THE COURT: Go ahead.

3 Q. Mr. Clark, did you ever see a drum of scrap
4 Pyranol during the time you were at Hudson Falls?

5 A. Please repeat the question.

6 Q. Did you ever see a drum of scrap Pyranol
7 during the time that you were at Hudson Falls?

8 A. I saw drums that contained scrap Pyranol.

9 Q. Can you tell us about what you understood
10 about how scrap Pyranol was generated?

11 A. Yes, I can.

12 THE COURT: Did you ever go into the parts of
13 the building where Pyranol was being used?

14 THE WITNESS: I was in the part of the
15 building. You can't get to the process area where
16 Pyranol is being used because the use is in ovens.

17 THE COURT: So you can get to the area where
18 the ovens are that Pyranol is being used in.

19 THE WITNESS: Ask me the question again.

20 THE COURT: Look, I'm not playing games here,
21 okay? I know there was a facility where you were making
22 capacitors, and I know you were using Pyranol to infuse
23 the capacitors for its use as a dielectric fluid. There
24 were people who were very familiar with that process and
25 people who were involved in actually working in

1 connection with that process. You were not intimately
2 involved in those things, and so I'm asking you though,
3 even though you weren't involved in doing it, were you
4 in the area where those people were working and could
5 see what was happening?

6 THE WITNESS: I was in the general area, yes.

7 THE COURT: I've heard discussions about there
8 being drip pans where capacitors that had Pyranol in
9 them that were coming through the production process
10 where drips of Pyranol would be collected. Do you know
11 anything about that?

12 THE WITNESS: I've heard about it. I've never
13 seen it.

14 THE COURT: You didn't see it, okay. I'm just
15 trying to know what kind of detail -- it sounds like he
16 doesn't really know a lot that's useful. I would love
17 to know from somebody who can tell me about that, but it
18 doesn't appear that he's the one that can do it.

19 THE WITNESS: I never had access to any of the
20 actual process areas.

21 Q. BY MR. BIAGETTI: Did you know anything about
22 GE's specifications for the use of Pyranol?

23 A. No.

24 THE COURT: I've heard some or read some
25 things that suggested that at one point at least GE had

1 a scrap Pyranol tank that was a big thousand-gallon
2 tank. Do you know anything about that?

3 THE WITNESS: No, I don't.

4 THE COURT: So that would be complete news to
5 you.

6 THE WITNESS: That's news to me.

7 THE COURT: Do you know there was a scrap area
8 where 55-gallon drums --

9 THE WITNESS: I am familiar with that, yes.

10 THE COURT: You were out there? You saw that?

11 THE WITNESS: Yes. As I would drive to work
12 in the morning, I could see it, yes.

13 THE COURT: All right. So you can tell me
14 about that part.

15 THE WITNESS: I can tell you about that.

16 Q. BY MR. BIAGETTI: I think that's what we
17 should talk about then. Before we get to where they
18 were stored in just one minute, you said you had seen
19 the drums themselves?

20 A. The 55-gallon drums, oh, yes.

21 Q. Did your department have any involvement in
22 buying those?

23 A. Some of them we did.

24 THE COURT: I'm confused. Do you remember
25 seeing 55-gallon drums of Aroclor that would actually be

1 purchased, according to you, not by you but by some
2 directive?

3 THE WITNESS: The other buyer, yes.

4 THE COURT: Because I've read something that
5 suggested that it would come in like tanker truck
6 shipments of thousands of gallons, but I've also heard
7 testimony that it came in in 55-gallon drums. Do you
8 know about that?

9 THE WITNESS: I do know about that. There may
10 have been -- to address your comment about big tanker
11 trucks of Pyranol, there could have been for some of our
12 larger contracts some large quantities of Aroclor, which
13 was named Pyranol for GE's brand name, but the normal
14 day-to-day low quantity orders for capacitors -- power
15 capacitors we're talking about now as opposed to small
16 industrial capacitors or electronic capacitors. We are
17 talking about power capacitors which are typically cans,
18 cases if you will, yay big. That material was delivered
19 to GE from Monsanto in 55-gallon drums. They were
20 distinctive in color, and I can remember seeing the
21 drums that the new material came in. It was our process
22 to utilize those same drums.

23 After they were empty and Pyranol was used in
24 our process, it was our practice to take the scrap
25 Pyranol and put it back into these 55-gallon drums to

1 save the cost of having to go out and purchase new drums
2 ourselves. So that was just an economic -- the deposit
3 that we had put down for that drum from Monsanto was
4 what it cost us to store the material so -- until it was
5 purchased by Fletcher.

6 THE COURT: I have an impression that Aroclor
7 went through some kind of a process at GE to become
8 Pyranol, that there was perhaps filtration, in certain
9 cases additives, that would make Aroclor such that it
10 was -- it complied with the specifications that GE had
11 for its capacitors. Do you know anything about that?

12 THE WITNESS: I don't know any of the details
13 for certain, no. Yes, I have the same impression that
14 something was happening in the process.

15 THE COURT: But you don't know whether, for
16 example, that processing occurred in -- within a drum of
17 Aroclor or whether it would be -- many drums of Aroclor
18 would be put into a tank, and whatever was done would be
19 mixed. Because I don't have a good handle on that and
20 you can't help me with that.

21 THE WITNESS: I can't help you on that. I
22 wish I could. I can't. I can talk to the issue that
23 Mr. Biagetti asked about, what do I know about the
24 processes that result in having scrap Pyranol, and this
25 information has passed on to me from my predecessor, Mr.

1 Keeney, and also conversations with our facilities
2 people who are involved -- who were the people who were
3 actually involved in handling the material that became
4 quality-wise no longer valid for our capacitor
5 manufacturing process, and this is where we get into the
6 chemical analysis, constant monitoring of the chemical
7 makeup of the Pyranol during the treat process.

8 THE COURT: This would be knowledge you
9 acquired by talking to people who were the people
10 responsible.

11 THE WITNESS: Hands-on people; right.

12 THE COURT: You don't have personal knowledge?

13 THE WITNESS: I don't have personal knowledge.

14 THE COURT: You heard other people tell you
15 this is the way.

16 THE WITNESS: That's exactly right.

17 MR. BIAGETTI: It's up to you, your Honor. If
18 you want it --

19 THE COURT: It seems like hearsay to me; so I
20 don't think we can get into it.

21 MR. BIAGETTI: Let's move on.

22 Q. Let's move on to something which I think you
23 did say you had personal knowledge of. The drums
24 themselves, not the contents.

25 A. Right.

1 Q. You said something about the Monsanto drums
2 being used?

3 A. Yes.

4 Q. Explain for the Court what you meant by that.

5 A. The material came to us from Monsanto,
6 Aroclor. It was taken out of the Monsanto drums and put
7 in these process tanks for submersion into impregnating
8 the capacitors. And the empty drum would be saved, not
9 discarded and not returned to cover our deposit on the
10 drums. We would save those and collect scrap Pyranol
11 and put it in these very same drums, relabel the drum as
12 scrap Pyranol, so there was never any question that it
13 was not the Aroclor, and it was stored in a section of
14 our storage yard separate from -- separated by quite a
15 distance from where Aroclor drums from Monsanto would be
16 stored.

17 Q. Before I get to storage, one more question
18 about those Monsanto drums that were then refilled and
19 labeled for scrap Pyranol. What was their condition
20 1965 to 1968, if you remember?

21 A. Excellent. They were in very good condition.

22 Q. Did you ever have occasion to use drums other
23 than the Aroclor drums to drum up scrap Pyranol?

24 A. At times the amount of scrap Pyranol being
25 generated was more than we could get back into

1 Monsanto's drums, and when that would happen, the
2 facility organization -- this would be Mr. Moss, Mr.
3 Bramer, that group, would actually request us to
4 purchase used 55-gallon drums. These would have to be
5 drums that we would buy from a scrap dealer that were in
6 good condition. They couldn't be rusted, they couldn't
7 be leaking, they couldn't have damage to them. They had
8 to be in very good condition, and my buyer handled that
9 procurement routinely.

10 Q. And rough order of magnitude if you can
11 recall. If not, don't guess, Mr. Clark. During the
12 time that you were an indirect buyer and had occasion to
13 observe the drums, what proportion were the Monsanto
14 drums being reused versus the drums from another vendor?

15 A. I can answer that fairly reliably. It would
16 be an estimate on my part, but knowing what was
17 happening at the time, I would say that the ratio was
18 probably 70 percent Monsanto drums, 30 percent used
19 drums. That's an educated guess, my best.

20 THE COURT: Do you know how much Pyranol would
21 remain in a capacitor if it was properly constructed?

22 THE WITNESS: No, I don't. No. I know the
23 question you asked, and I don't know the answer.

24 THE COURT: Because I'm just doing a
25 quantitative assessment. What you are saying is more

1 scrap Pyranol comes out of the process than clean
2 Pyranol went into the process you are telling me.

3 THE WITNESS: Yeah, yeah, in a different stage
4 of the capacitor.

5 THE COURT: And certainly a significant
6 portion of Pyranol remains with the product.

7 THE WITNESS: Oh, absolutely. It's a
8 dielectric, yes.

9 THE COURT: So a significant portion of the
10 scrap Pyranol by definition would have to include
11 materials other than Pyranol. It's just a matter of
12 physics; right? You take a 55-gallon drum, you make
13 your capacitor, you collect your scrap Pyranol, there's
14 some Pyranol in the capacitor, there's more volume of
15 waste than there was Pyranol to start. So you figure
16 out the amount of waste, how much more do you have, plus
17 how much went into the capacitor, and you can figure out
18 how much waste is in each barrel. That makes -- I think
19 it makes quite clear the point that the scrap Pyranol
20 contained significant amounts of materials other than
21 Pyranol. Just a matter of physics; right?

22 MR. BIAGETTI: Significant amounts is in the
23 eye of the beholder, Judge, yes.

24 THE COURT: He's saying 30 percent of the
25 barrels are used barrels because there are not enough

1 Pyranol barrels left to capture all the scrap Pyranol.
2 You see the mechanics of it. You start out with ten
3 barrels of Pyranol. You need at the end
4 thirteen barrels to collect the waste -- the scrap
5 Pyranol. You subtract out the amount of Pyranol that
6 was actually in the capacitors, and you take those --
7 that amount and say, wow, at least three barrels out of
8 the thirteen mixed together is not Pyranol, and in fact
9 more than that is not Pyranol because we know that the
10 purpose of using this dielectric fluid is to put it into
11 the capacitor. It's not like you soak it in it like a
12 degreaser. The capacitor uses the Pyranol; right?

13 THE WITNESS: It retains a portion of it.

14 THE COURT: Yeah, that's why you put it in, so
15 that it will be retained. It's not like it's a paint
16 coating where you put paint on the outside or it's not
17 like a degreaser where you're trying to get all the
18 degreaser off the product before you sell it. It's a
19 product, the manufacturing of which requires a certain
20 amount of Pyranol.

21 That's what I'm taking from this testimony,
22 which is evidence that there was a significant amount of
23 non-Pyranol in the scrap Pyranol drums since as many as
24 30 percent of the barrels needed to capture it were not
25 Pyranol barrels, and GE being a careful money-making

1 company isn't going to buy barrels it doesn't need, and
2 if they could capture all of the used Pyranol in the
3 existing barrels, they would have certainly done that.
4 Okay.

5 MR. BIAGETTI: Do you want me to comment on
6 that?

7 THE COURT: Comment if you want, sure.

8 MR. BIAGETTI: The only thing that analysis
9 leaves out is the evidence of the tanker trucks of
10 Aroclor that came to GE.

11 THE COURT: Yeah, that's why I was asking
12 about that, but I got the answer, sort of rarely, not
13 from what we were principally doing there.

14 THE WITNESS: Not from my analogy, no.

15 THE COURT: So tanker trucks would be a rare
16 event, not the usual event; correct? So I think that's
17 the problem with that.

18 THE WITNESS: I want to make one more comment
19 about the purchases of used drums to augment the
20 Monsanto drums. It was not an ongoing thing every day,
21 every week, every month. There would be times when we
22 would have to go out and buy a quantity of empty drums,
23 used drums, okay?

24 THE COURT: All right.

25 Q. BY MR. BIAGETTI: The condition of the used

1 drums that you would go out and buy during the time you
2 were there was what? The condition of the used drums
3 that you would buy, do you remember?

4 A. Good. They had to be good. That was a
5 requirement placed on our purchasing buyer by the
6 facilities people.

7 Q. You mentioned I believe that you saw these
8 drums of scrap Pyranol stored in the yard storage; is
9 that what you said?

10 A. Yes.

11 Q. Can you give us a picture of what that area
12 looked like?

13 A. Yes, I can.

14 Q. Please do.

15 A. There was a storage yard between our main
16 building and the Hudson River fenced in that we used to
17 store materials, incoming and outgoing. There was a
18 section of this yard that was assigned for storage of
19 scrap Pyranol. There were so many barrels on a pallet,
20 and it was in this one section, and everything in that
21 section was clearly marked as scrap Pyranol. That area
22 was not fenced in separate from other areas, but it was
23 in a designated section of the yard, and that's where
24 the material always was put, and that's where our
25 purchaser would always take material from that area.

1 Q. How did you observe that it was a designated
2 section, Mr. Clark?

3 A. Observation.

4 Q. What caused you to think that it was
5 designated for that purpose?

6 A. That's where it was. In talking to Mr. Varnum
7 I said where is your scrap Pyranol, and he said we keep
8 it right here.

9 Q. Was that area physically separated somehow?

10 A. By distance.

11 Q. How much distance?

12 A. Oh, fifty yards, a hundred yards, whatever,
13 order of magnitude.

14 Q. You said it was -- the area where the scrap
15 Pyranol was stored was fifty to a hundred yards from
16 what?

17 A. Any of the other barrels of either Aroclor
18 coming from Monsanto, any other chemicals; such as,
19 trichloroethylene, any of the metals that were used in
20 our process.

21 Q. So trichloroethylene was stored on that dock
22 as well during the time you were there?

23 A. In a separate part of the storage yard, yes.

24 Q. Did you see it there?

25 A. Yes, I did.

1 Q. Did you see the drums it was stored in?

2 A. Yes, I did.

3 Q. What color were they?

4 A. They were not black. They were typically a
5 light-colored drum from my recollection, and I have
6 nothing that I can go to to refresh my memory any better
7 than that. My impression was if they weren't yellow
8 drums, it was a color drum -- a lighter color drum than
9 Pyranol or color.

10 Q. And what was the color of the Pyranol drums?

11 A. Black.

12 Q. And what was the label on the Pyranol drums?

13 A. The original label would have been Aroclor
14 from Monsanto. It would have been relabeled scrap
15 Pyranol by our own people.

16 Q. And when you say it would have been, I don't
17 want you to guess. Do you remember seeing scrap Pyranol
18 drums labeled scrap Pyranol from 1965 to 1968?

19 A. Yes, I did.

20 Q. What, if anything, did you know of Fletcher --
21 did you call it Fletcher Paint or Milford Paint Works?
22 What did you know it as?

23 A. Both.

24 Q. What did you know of the Fletcher Milford
25 business?

1 A. That's the best identification for the
2 company. Fletcher's Milford Paint Works.

3 Q. What did you know of their business, 1965 to
4 1968?

5 A. What did I know of it?

6 Q. Yeah, what did they do?

7 A. They manufactured paint. I knew nothing more
8 than that.

9 Q. Did you know what kind of paint?

10 A. No, I did not.

11 Q. Did you know how much paint?

12 A. No, I did not.

13 Q. Did you know whether or not they made
14 rubber-based paint?

15 A. No, I did not.

16 Q. Did you know whether they used scrap Pyranol
17 in the paint?

18 A. Yes, I did.

19 Q. How did you know that?

20 A. Because all the conversations that I had with
21 the buyer that I succeeded and all of the people who had
22 hands-on experience with it who dealt with the Monsanto
23 truck driver always said he uses it in his process.

24 Q. You said the Monsanto truck driver.

25 A. Fletcher's truck driver. Correction.

1 Fletcher's truck driver was always taking it to be used
2 in their process. My conversations with Mr. Fletcher
3 himself, he always talked as we can't use any more right
4 now.

5 MS. ROWLEY: Your Honor, we move to strike his
6 response as hearsay.

7 THE COURT: Well, he said a lot of different
8 things there; so you have to break it out, okay? What
9 other employees at the company told him they understood
10 it was for, there are some statements he made about
11 that, and then at the end he talked about Mr. Fletcher
12 told me that he could not use any more than that. Are
13 you seeking to strike all of those statements?

14 MS. ROWLEY: I believe the response he gave
15 directly to Mr. Biagetti's statements, did you know what
16 Fletcher's was doing, and he said yes, he was using it,
17 and that that was based on information he was told by
18 other people.

19 THE COURT: Strike all of that testimony and
20 go through it again and break down what the source of
21 his knowledge is as to -- he says he knew that they were
22 using it. Let's try to establish specifically how he
23 knew that Fletcher was using it. There is a difference
24 between that Fletcher was using it and that Fletcher was
25 using it in paint. In fact, we know he wasn't using it

1 in paint except in rubber-based paint products. There's
2 testimony -- Abbe at one time said Fletcher told him
3 they used it for a defoliant. He later backed away from
4 that statement.

5 So we've got to understand more clearly what
6 he says he knew and how he came to know what he knew
7 because there's all kinds of different testimony about
8 it.

9 MR. BIAGETTI: Sure.

10 Q. 1965 to 1968 did you ever have an
11 understanding that Mr. Fletcher was using scrap Pyranol
12 in paint?

13 A. Yes, I did.

14 Q. What was your basis for that understanding,
15 just your basis?

16 A. Statements from Bob Keeney, the buyer that I
17 succeeded.

18 Q. Anyone else besides Mr. Keeney?

19 THE COURT: When did Mr. Keeney tell you?

20 THE WITNESS: December of 1965.

21 THE COURT: So at the time he was -- he had
22 formed this belief is when he was telling you about it.
23 I'm trying to understand. You are testifying that --
24 what's this guy's name?

25 THE WITNESS: Bob Keeney.

1 THE COURT: Mr. Keeney told you in the 1960s
2 that at that time it was his belief that Fletcher was
3 using it in paint.

4 THE WITNESS: That's correct.

5 THE COURT: Okay. That seems to be a version
6 of the same kind of argument that you are making for
7 things that you want a statement of belief in except
8 it's different in that it's not a remembered belief but
9 a current belief.

10 MR. BIAGETTI: Exactly.

11 THE COURT: I'm going to overrule the
12 government's objection and admit it not for the truth of
13 what Fletcher was using it for, but because this witness
14 is testifying that Mr. Keeney had a then existing belief
15 that he relayed to this witness as to what it was being
16 used for. So for that limited purpose, I will allow it.
17 I distinguish my prior ruling about your effort to get
18 in something by a statement of belief because that was a
19 remembered statement of belief as I saw it. That's why
20 this one is admissible and the other one isn't. All
21 right?

22 Q. BY MR. BIAGETTI: What did Mr. Keeney tell
23 you?

24 THE COURT: I think he covered it, that he
25 believed they were using it in paint.

1 A. He told me that Fletcher and Milford Paint
2 used the Pyranol in his business.

3 Q. Did Mr. Keeney tell you that Mr. Fletcher was
4 using it in paint for anything else besides paint?

5 A. No, absolutely not.

6 Q. Any other colleague at GE who at the time told
7 you anything about Fletcher's use of Pyranol that you
8 can remember?

9 A. Not specifically about what his use was, no.

10 Q. Anybody outside of GE who at the time told you
11 anything about Fletcher's use about scrap Pyranol as
12 paint?

13 A. No.

14 MS. ROWLEY: Objection.

15 THE COURT: Overruled.

16 Q. Did you ever have any conversation with Mr.
17 Fletcher himself?

18 A. Yes, I did.

19 Q. Did he say anything to you on that subject?

20 A. Yes, he did.

21 Q. What did he say?

22 A. Conversation was in January of 1968. I had
23 called him with our concern over him stopping the sale
24 of Pyranol, from buying scrap Pyranol from us. His
25 statement to me, I can remember he said, I can't use

1 any more of it at this time. I would like to use it --
2 I would like to buy more -- keep the door open and buy
3 more later, but I can't use it right now. My inventory
4 is quite high.

5 Q. We'll go back to that conversation later.

6 THE COURT: While we're on the subject of what
7 people told you, I have a report, the admissibility of
8 which is subject to objection at this point, but in that
9 report prepared by GE, it reflects that Abbe told the
10 people preparing the report that he had also heard that
11 Fletcher was using scrap Pyranol as a weed killer. To
12 your knowledge did Abbe ever tell you that at the time?

13 THE WITNESS: No.

14 Q. Did anybody ever tell you that Mr. Fletcher
15 was using Pyranol for anything other than in paint?

16 A. Just paint.

17 Q. And my colleagues remind me that I misspoke a
18 few questions ago for I'm sure not the first time. Did
19 Mr. Keeney ever tell you that Mr. Fletcher was using
20 Pyranol in anything other than paint? Mr. Keeney, did
21 he ever tell you that?

22 A. No.

23 Q. Thank you. Do you recall GE ever shipping
24 scrap Pyranol to Mr. Fletcher? Did GE ever send it out?

25 A. During my time there, no other shipments were

1 made other than Fletcher's truck picking up material.

2 Q. How would it come about that Fletcher would
3 come to the plant to pick up, do you know?

4 A. That was a flexible arrangement. It changed
5 from time to time. Typically Fletcher would have a
6 pretty good idea how much Pyranol we were generating and
7 how many drums we would probably have. So he would work
8 it out with his truck driver. The truck driver would
9 verify with Mr. Varnum that they had at least 70 drums,
10 and when they had at least 70 drums ready for sale,
11 Fletcher's truck driver would come to Hudson Falls and
12 purchase 70 drums' worth. Seventy drums' worth I found
13 out from Mr. Varnum is how many would get on Fletcher's
14 truck in one shipment.

15 THE COURT: Seventy?

16 THE WITNESS: Seventy, 7-0.

17 THE COURT: Most of the testimony I've heard
18 suggested that it would take 18 or 20 drums at a time.

19 THE WITNESS: No, 70 is the number.

20 THE COURT: You never saw the drums being
21 loaded on the truck?

22 THE WITNESS: They're 55-gallon drums.

23 THE COURT: No, I've had the drivers testify
24 what they would load, and one said 18, one said 20.
25 Have I got that wrong, counsel?

1 MS. ROWLEY: That's correct, and Mr. Whitney
2 testified about a tractor-trailer truck yesterday that
3 would hold 70 drums.

4 THE COURT: Yes, there was testimony about a
5 tractor-trailer truck, but in terms of the drivers from
6 Fletcher picking it up, they would go with a truck that
7 would be 18 or 20.

8 MR. COWAN: I think the testimony also is that
9 they would make multiple trips.

10 THE COURT: I didn't hear a lot of consecutive
11 day-to-day, but yeah, they'd go up there and get it.
12 Whenever they wanted it, they would go up and get it.

13 Q. BY MR. BIAGETTI: Did anybody ever tell you
14 that Fletcher was reselling the Pyranol he was buying
15 from GE?

16 A. No.

17 Q. Did anybody ever tell you that Fletcher was
18 disposing of the Pyranol he was buying from GE?

19 A. No.

20 Q. Mr. Clark, I want to show you up on the screen
21 I hope another document.

22 THE COURT: You want the document camera or
23 the computer?

24 MR. BIAGETTI: The document camera, please.

25 Q. This is Defendant's Exhibit 13, a GE memo from

1 E.E. Cozzens to Mr. Fletcher dated August 31, 1967. Mr.

2 Clark, have you seen this document before?

3 A. Yes, I have.

4 Q. And at around that time, August of 1967, do

5 you remember ever seeing the document?

6 A. I recall it now, now that I've seen it.

7 Q. Do you recall receiving it at around the time

8 of August of '67?

9 A. Yes, absolutely.

10 Q. There's a note which I'm going to zoom in on

11 on the left-hand side.

12 A. November 20, 1967.

13 Q. The copying chopped a bit of it, but I think

14 it says, gave to Al Clark for follow-up on 11/20/67. Do

15 you see that?

16 A. Yes, I see that.

17 Q. Did you know who E.E. Cozzens was?

18 A. Yes, I do.

19 Q. Who was he or she?

20 A. It was Elmer Cozzens. He worked for Earl

21 Jones, and he was the accounts receivable/accounts

22 payable administrator.

23 Q. And do you recall whether or not he gave you

24 this document around November of 1967?

25 A. Probably did.

1 Q. Don't guess.

2 A. It was too long to say for certain that I
3 received it on that date.

4 THE COURT: I appreciate your being candid
5 about it, but practically speaking, I'm going to infer
6 that you did get it.

7 THE WITNESS: I would, too. That's safe.

8 THE COURT: I mean, I'm allowed to make the
9 inference. You're not. I'm inferring it, whether you
10 remember it or not.

11 THE WITNESS: Yes. Agreed.

12 Q. In the memo Mr. Cozzens says to Mr. Fletcher,
13 we find several old past-due debt amounts in your
14 account. He says he's enclosing copies. He asks for a
15 check for \$6,206. Had you ever heard up until this
16 time, August of 1967, that Mr. Fletcher was behind on
17 his account?

18 A. This was my first knowledge of it.

19 Q. And what was your reaction to it, if you
20 remember?

21 A. It needed to be attended to, but at that time
22 it was between the collection people for GE, Mr. Cozzens
23 and Mr. Jones, dealing with Mr. Fletcher's company.
24 There was no -- before that I was never asked to get
25 involved and try to help resolve this.

1 Q. So from any source did you know --

2 A. Any source.

3 Q. -- prior to this that Mr. Fletcher was
4 delinquent?

5 A. No, I knew nothing of the problem before this.

6 Q. What, if anything, did you do in response to
7 learning that?

8 A. We didn't immediately react to it because we
9 had other situations with the scrap Pyranol. We wanted
10 to make sure we understood if there were other things
11 going wrong with the process. What were the reasons why
12 -- we didn't know the reasons why he wasn't paying,
13 okay? So -- but on the other hand he'd also stopped
14 picking up material.

15 There is another document that we'll get to
16 later you will see the similarity in the timing. Middle
17 of November 1967, that's when he stopped picking up
18 material also. And so there was too many questions,
19 there was too many unknowns to take any action at this
20 particular time. So we deferred acting on it until we
21 had more information on what was going on with Fletcher.

22 Q. Did you talk to your boss about it?

23 A. Absolutely.

24 Q. What did you say to him?

25 A. I'm confused. We've got to do something about

1 it, but not right now.

2 Q. Why did you say not right now?

3 A. Because of the dual objectives of selling the
4 used Pyranol. We didn't want to jeopardize that. We
5 wanted to make sure that -- find out if this was a
6 temporary situation in his cash flow for Fletcher as
7 opposed to a more serious problem with Fletcher's
8 ability to pay. We wanted to make sure we didn't do
9 anything that would jeopardize the customer relations
10 that we had set up between GE and Fletcher's, and so we
11 said we will proceed but proceed with caution.

12 Q. Did you have a view at the time of whether a
13 \$6,000 debt was a big one, a small one, a medium one for
14 GE?

15 A. At the time it didn't sound like a large
16 amount, but also at the same time I had no idea
17 historically how much we had been selling to Fletcher in
18 the past. So I couldn't say if it was 15 percent or
19 50 percent or 75 percent of the total business with
20 Fletcher. It sounded like it was a small amount of
21 money to me.

22 Q. Did you eventually follow up on Mr. Cozzens'
23 request?

24 A. Eventually I did, yes.

25 Q. What did you do?

1 A. We were getting -- as I said, the last sales
2 to Fletcher occurred middle part of November 1967. We
3 were continuing to generate scrap Pyranol, and it was
4 actually building up at a steady rate, and that means
5 purchased by Fletcher. In probably I can pretty well
6 conclude that it was January of 1968 that the problems
7 of selling future sales to Fletcher and the unpaid
8 shipping memos, I had talked to Mr. Fletcher about these
9 two problems together. I called Mr. Fletcher January --
10 sometime during January of 1968, and I talked about the
11 fact that he hadn't been picking up, buying from us --
12 picking up and buying from us any Pyranol since the
13 middle of November and was curious as to whether there
14 was a problem with his taking this material and buying
15 more of it. And it was at that time that he mentioned,
16 I've got -- my inventory is quite high. I can't use any
17 more at the present time.

18 On the same conversation though I said -- I
19 reminded him, I said, now, you've been contacted by our
20 accounting people informing you of -- do you know about
21 your unpaid bills approaching \$7,000, and he said, yes,
22 I know about that. And I said, well, we need a
23 resolution on both of those issues, and he said he would
24 get back to us. He had no immediate response. He
25 didn't have any course of action that he could share

1 with me. He said, I will think about it and I will get
2 back to you. That was the conversation in January 1968.

3 Q. Do you remember -- you said you were
4 addressing really two issues with him. Do you remember
5 the sequence? Did you talk about the fact that he owed
6 money first or later?

7 A. No, just the opposite. I talked about his
8 buying more Pyranol first.

9 Q. Why is that?

10 A. To us, my manager, myself, the most urgent
11 item to address was resuming the sale of Pyranol.

12 Q. Why?

13 A. It was building up. We were running out of
14 room. We needed the room, and it was a method of
15 generating some additional money, but it was really the
16 space as the business pressure to have him come and buy
17 more material.

18 THE COURT: Let me just run by you my take on
19 this and tell me whether you think I'm off base, okay?
20 At the Hudson Falls plant and the other plant, GE was in
21 the business of making capacitors. The profit it was
22 going to make from that business was through the sale of
23 capacitors.

24 THE WITNESS: Correct.

25 THE COURT: While it's good to make money

1 selling scrap Pyranol, the amount of money that GE can
2 make selling scrap Pyranol is a tiny, tiny fraction of
3 the money it makes selling capacitors.

4 THE WITNESS: Very low.

5 THE COURT: The business of GE is going to be
6 best furthered by making sure that an inventory of scrap
7 Pyranol doesn't continue to build up. So GE's primary
8 motivation there is to get rid of the scrap Pyranol, and
9 to the extent they can make money doing so, great.

10 THE WITNESS: That was just a byproduct. That
11 was nice.

12 THE COURT: Is my take on that about right?

13 THE WITNESS: Perfect, perfect, exactly right.
14 And the discussion on the \$7,000 was at the end of our
15 telephone conversation. It was a sort of a, oh, and by
16 the way, we can't forget about it, you know.

17 Q. BY MR. BIAGETTI: What was the benefit to GE
18 of the arrangement with Mr. Fletcher, the benefits?

19 A. The benefits of the arrangement?

20 Q. Yeah.

21 A. Both companies benefitted by it. It was an
22 economical way of disposing -- and I will use that word
23 not to be confused with throwing away, but disposing of
24 it and moving it off our premises to a company who had a
25 use for it.

1 THE COURT: Your use of disposal is the way
2 most people understand disposal. From GE's perspective
3 you wanted to get rid of it. It wasn't that you
4 necessarily wanted to put it in the ground.

5 THE WITNESS: Right.

6 THE COURT: In fact, if you could sell it for
7 use, that would be all the better, but your primary
8 motivation was to get rid of it.

9 THE WITNESS: Get rid of it, move it off our
10 premises so that we could get on with the business of
11 manufacturing capacitors. But the arrangement that was
12 set up in 1954, '55, and '56 was perfect because he
13 could use that material, and he was willing to pay \$3.75
14 for every drum that he purchased.

15 Q. BY MR. BIAGETTI: Do you remember having any
16 understanding that Mr. Fletcher was going to dispose of,
17 discard the material?

18 A. No. He would never have -- logically he would
19 not have paid to buy material and then throw it away.

20 MS. ROWLEY: Objection.

21 A. So logically it didn't make any sense to even
22 consider it. Never even thought about it.

23 THE COURT: I will take the testimony for what
24 it's worth, okay? I think there is a different logical
25 calculus that I'm inclined to engage in based on what

1 I've heard so far, but I will certainly hear the
2 witness's interpretation.

3 Q. I'm interested, Mr. Clark, in what you recall
4 of your analysis at the time. Is that what it was, what
5 you just explained?

6 A. Yes.

7 Q. You told us a little bit already about the
8 call to Fletcher and the conversation with Fletcher and
9 what he said. Did he in the conversation ever complain
10 about the quality of any of the Pyranol he had gotten?

11 A. He never said anything about any concerns
12 about the quality.

13 Q. Have you ever heard a concern from him
14 directly or indirectly before that?

15 A. None.

16 Q. Did you ever hear from Mr. Fletcher after that
17 call?

18 A. I received a letter that he wrote to me. The
19 date of the letter was --

20 Q. We'll show it to you.

21 A. -- February 16th. Yes, that's the letter.

22 Q. This is a letter from Fletcher's Milford Paint
23 Works. On page two we have a signature that appears to
24 be that of Frederic Fletcher to Mr. Clark here of the
25 salvage department. Is this the letter you are talking

1 about?

2 A. This is the letter.

3 Q. Were you in the salvage department?

4 A. No, I was not, but the letter got to me
5 because my name was on it and it was received in
6 purchasing.

7 Q. Do you remember reading it?

8 A. I read it. At the time I read it -- received
9 it and read it and -- yes, I read it.

10 Q. Do you remember what your immediate reaction
11 to it was?

12 A. Disbelief, part of it. The setting up of the
13 history of the relationship between Fletcher's Paint and
14 General Electric was -- as I had been told from Mr.
15 Keeney, that we did have a long-term good relationship
16 with the sale of this material to Fletcher's Paint.

17 THE COURT: Let's be clear about this. Your
18 knowledge about that is secondhand. It's what other
19 employees told you about this long-term relationship.
20 Did you work with Mr. Metevier, for example?

21 THE WITNESS: No.

22 THE COURT: Mr. Metevier was the one that had
23 the relationship with Fletcher's and, for example, I've
24 heard testimony that the relationship was good because
25 Mr. Metevier would make adjustments and not charge

1 Fletcher for barrels that would not be usable by
2 Fletcher. You don't have any personal knowledge of
3 that; right?

4 THE WITNESS: No.

5 THE COURT: You don't know whether that's true
6 or not true.

7 THE WITNESS: I can't say.

8 THE COURT: Okay.

9 Q. BY MR. BIAGETTI: Any other reasons that you
10 say your immediate reaction was disbelief?

11 A. Because as we talked about before and as I
12 testified, there had been no indications of any problem
13 from a quality point of view for this material. This is
14 the very first time that any of the quality issues have
15 been raised and communicated to anyone from GE.

16 Q. Well, he says in the second paragraph to you,
17 about two or three years ago something happened or shall
18 we say a variety of things happened. That's from 1965
19 to 1968, the time you were there. Do you recall
20 anything happening to the scrap Pyranol?

21 A. No, just the opposite. The processes during
22 all that time remained exactly the same as they had for
23 the ten years before that.

24 THE COURT: Do you know the difference between
25 Pyranol 1 and Pyranol 2?

1 THE WITNESS: No, I don't.

2 THE COURT: Well, they did change the Pyranol
3 during that period from Pyranol 1 to Pyranol 2, which
4 did change the formulation of it. But you don't have
5 any knowledge of it.

6 THE WITNESS: I have no knowledge of it. To
7 me it was scrap Pyranol.

8 Q. BY MR. BIAGETTI: One of the things that Mr.
9 Fletcher says here is that the drums the Pyranol was
10 shipped in were reasonably clean and not badly
11 contaminated, but that one of the things that happened
12 was that you put the Pyranol in badly contaminated
13 drums. Do you remember any change in the drums during
14 the time that you were at the indirect buying
15 department?

16 A. Not in the drums that I knew that we were
17 providing, no.

18 Q. He mentions drums one-quarter and one-half
19 full. Do you remember anything on that subject prior to
20 this?

21 A. No.

22 Q. Or drums that were more than half water?

23 A. No.

24 THE COURT: If there were a problem -- because
25 you weren't out there inspecting the scrap Pyranol;

1 right?

2 THE WITNESS: No, I wasn't.

3 THE COURT: So you don't know anything about
4 the scrap Pyranol based on personal knowledge as to
5 whether it was pure, high grade, contaminated. You have
6 no knowledge of that.

7 THE WITNESS: It was scrap. It had gone below
8 the acceptable level of chemical composition that would
9 make a capacitor work. That's all I knew.

10 THE COURT: And you wouldn't be out there at
11 the loading dock when Fletcher's people would come to
12 get it.

13 THE WITNESS: I never was.

14 THE COURT: So if there's testimony about them
15 coming out at some point testing -- actually sampling
16 drums to determine -- with a hydrometer to determine the
17 specific gravity, you don't have any knowledge of that?

18 THE WITNESS: No, I don't.

19 THE COURT: And if there were a person who
20 Fletcher would complain to directly about a problem,
21 would that be you or would he talk to Mr. Varnum or
22 before Mr. Varnum, Mr. Metevier?

23 THE WITNESS: He would talk to Mr. Fletcher
24 about it. Mr. Fletcher would call me.

25 THE COURT: So your practice was it was not

1 Mr. Varnum who talked to Fletcher.

2 THE WITNESS: If he calls Mr. Varnum and
3 talked about a problem, Mr. Varnum would have to get me
4 involved immediately because that was the role that I
5 played, was making sure that that contract, the
6 agreement, was administered fairly between the two
7 companies.

8 THE COURT: And so your position is that
9 during the entire time you worked there until this
10 letter came to your attention, not one complaint was
11 made to you by Mr. Fletcher, and Mr. Varnum did not
12 relay any complaints to you?

13 THE WITNESS: That's the statement.

14 THE COURT: And that's what you know.

15 THE WITNESS: That's what I know.

16 THE COURT: Okay.

17 Q. BY MR. BIAGETTI: And given the course of your
18 job responsibilities at the time, if there had been such
19 a problem connected to payment, would you have heard
20 about it?

21 A. Yes, I would have.

22 Q. Mr. Fletcher also says to you in this letter
23 that some other trucker who you evidently called has
24 been hauling to us. Do you recall that ever happening
25 1965 to 1968?

1 A. It never happened. I never did it.

2 Q. Did you have a belief at that time as to why
3 Mr. Fletcher was saying these things in this letter?

4 A. To avoid paying \$7,000.

5 Q. On the second page of the letter he makes a
6 proposal to you. He says, we are willing to negotiate a
7 settlement of what is owed or we are willing to go
8 through all these drums with your chemist present. Did
9 you see that?

10 A. I see that.

11 Q. Did you have a reaction to that proposal?

12 A. Yes, I did.

13 Q. What was it?

14 A. Without knowing how much a chemist's time was
15 worth or not knowing how much other work would have to
16 be put on hold to get a chemist to come up to Milford,
17 my reaction was it would be more, more expensive to us
18 to go along with this proposed settlement than to just
19 not collect the \$7,000.

20 Q. Did you have any idea at the time of how long
21 it would take a chemist to go through what Mr. Fletcher
22 says was 1,800 to 2,000 drums?

23 A. I talked with Abbe about this letter and we
24 sort of concluded in our conversation -- we were
25 probably talking a week's time, travel up there, a few

1 day's working with Fletcher's people, and in return we
2 saw a week of lost time for the chemist at least.

3 Q. And on this same page, Mr. Fletcher says since
4 your man has been hauling, you have apparently been
5 loading everything on God's green earth on the truck.
6 Did you see that?

7 A. I see it.

8 Q. Did you believe that to be true at that time?

9 A. Absolutely not. I did not believe that could
10 be happening.

11 Q. What, if anything, was your belief about the
12 quality of the Pyranol that had been sent to Mr.
13 Fletcher?

14 A. It was the same as he had been buying right
15 along. None of our processes changed. The drums that
16 the material was put in were either the Monsanto very
17 good drums or our very good drums that we bought used.

18 THE COURT: Can we break for lunch now, and
19 why don't we start up again at 1:30. So you can take a
20 break now, and if you could just walk out of the
21 courtroom for a minute, I wanted to talk to the parties
22 about something. Thank you, sir. Come back at 1:30,
23 please.

24 (Witness left courtroom.)

25 THE COURT: I'm not sure what conclusion you

1 want me to draw from this. I think you're asking me to
2 say, to think that this letter is posturing to try to
3 receive a favorable settlement of the debt that was owed
4 to GE; right?

5 MR. BIAGETTI: At least that was GE's
6 understanding at the time.

7 THE COURT: And I understand that that would
8 be posturing, but it's hard for me to figure out -- I
9 mean are you saying that he made up a totally false
10 claim that GE was sending stuff to Fletcher? Because he
11 would have to be the most irrational negotiator in the
12 world to try to settle a debt by making such an
13 outrageously false claim. He would be much better off
14 making a claim: The stuff you are giving me is junk and
15 you've changed your practice.

16 I can see him making that kind of totally
17 false claim, but I can't see him making up a claim about
18 a verifiable fact that the parties could not possibly
19 dispute about whether or not the stuff was getting to
20 Fletcher by a Fletcher driver or by somebody else. I
21 mean, put yourself in Fletcher's position and say, okay,
22 I'm doing what counsel says. I'm trying to cook up a
23 plan to force GE to write off this debt. So what I'm
24 going to do is, even though we have been picking the
25 stuff up, I'm going to lie about that. I'm going to say

1 GE has been sending it to us.

2 That's just insane. He would never say that;
3 right? Is it reasonable to assume that rational people
4 don't act in an insane way? I think that's -- when I
5 try to find facts, that's what I assume. Mr. Fletcher
6 didn't appear to be insane as far as I know, rational
7 businessman. Okay? I can see him, I can picture him
8 doing what you're saying. I've got to get this debt
9 written down. I'm going to do whatever it takes to get
10 the debt written down. But I see him doing rational
11 things like making a claim, even if it's exaggerated,
12 that this is all junk. I don't see him making a claim
13 that you've been sending us this stuff when, in fact,
14 he's been sending his man up to pick it up. And that's
15 what you're asking me to believe, and that sort of
16 defies reality. This guy is clearly wrong about it.

17 MR. BIAGETTI: No, I'm not asking you -- it's
18 not irrational to make a mistake, Judge. He could have
19 been mistaken about which drums of Pyranol he was
20 talking about.

21 THE COURT: No, no, I'm talking about the
22 letter says -- I don't have it in front of me.

23 MR. BIAGETTI: Yeah, your man was hauling. He
24 could be mistaken about that. He says in the next
25 sentence, unknown to me. This has been going on for a

1 long time. This man -- the evidence from Mr. Hooper is
2 that this man was buying Pyranol from several sources.
3 So he could well be mistaken.

4 THE COURT: Okay. Not lying then, not lying
5 for leverage purposes, just mistaken.

6 MR. BIAGETTI: Just mistaken, of course.

7 THE COURT: That's at least theoretically
8 possible, but given the nature of the Fletcher
9 operations where he had four or five employees, he knows
10 if he's sending his man up there to get stuff from GE or
11 not.

12 On the other hand, do you have evidence that
13 GE was sending stuff at this time?

14 MS. ROWLEY: Your Honor, it's evidence that a
15 separate independent contract truck, not a Fletcher's
16 truck, was driving to get the material from GE and
17 delivered.

18 THE COURT: Is that this bigger truck that you
19 were talking about?

20 MS. ROWLEY: That Mr. Whitney spoke of, that
21 Mr. Racicot spoke of.

22 THE COURT: It was not a Fletcher truck, but
23 that Fletcher was paying for it?

24 MS. ROWLEY: I believe that's the evidence.

25 THE COURT: Well, then why would Fletcher make

1 a statement that your man was delivering it?

2 MS. ROWLEY: We just don't know. I mean, this
3 is the only statement we have about this in the record.
4 I mean, it's possible both things happened.

5 MR. COWAN: I'm not sure that the record will
6 reflect that, Judge. We have now had testimony from Mr.
7 Hooper and Mr. Whitney. I believe both testified about
8 a gentlemen by the name of Ted Madsen; both believed
9 that he was hired by Fletcher to transport materials to
10 Fletcher. That's in the record in this case from the
11 mouths of those very gentlemen who were at there.

12 THE COURT: Do you dispute that?

13 MS. ROWLEY: No.

14 THE COURT: So the best evidence is that it
15 was not Fletcher and it was not GE. It was a contractor
16 hired by Fletcher, and what you want me to assume is
17 that that statement is a mistake by Fletcher.

18 MR. BIAGETTI: You may draw that inference,
19 sure.

20 THE COURT: But I'm asking -- normally you
21 want me to draw inferences from facts. That's why you
22 elicit them. Just tell me what you want me to conclude.
23 I want you to conclude, Judge, that this was all
24 posturing and that there was no problem with the drums
25 and that everything in here is false or mistaken.

1 That's the addition which I wasn't gathering and you
2 asking me to say that that statement was mistaken on
3 Fletcher.

4 MR. BIAGETTI: We, again, your Honor --

5 THE COURT: And the evidence would tend to
6 support the view that it is mistaken. That's what I'm
7 trying to find out.

8 MR. BIAGETTI: Yes, that's what I'm urging.
9 And, again, Judge, all for the purpose that the
10 burden -- there's no burden on GE of any kind, but
11 certainly there is no burden to figure out what was true
12 back at Fletcher. It's to understand what GE's state of
13 mind was once they received this letter. He says
14 disbelief --

15 THE COURT: If you think that's all that's
16 useful for, you are not seeing the case the same way I
17 do. It's highly useful in trying to make an assessment
18 of what was the nature of the scrap Pyranol that was
19 going from GE to Fletcher, because that's a very
20 important fact in determining what GE knew and intended
21 when it entered into this arrangement.

22 I guess I haven't made any secret of the model
23 that I'm trying to falsify here. My approach is you
24 make an assertion about what happened. You make an
25 assertion about what happened. I say there's a possible

1 middle ground about what happened, and when I try to go
2 through the evidence and I try to falsify every possible
3 explanation, that's the way I go about finding facts is.
4 People say something happened, and I start from the
5 premise that it didn't, and I see if I can demonstrate
6 that it didn't. And if I can demonstrate that it
7 didn't, then I've falsified it and I can rule that out.
8 If I can't demonstrate that it didn't, then I possibly
9 have to accept it as a fact. Then I have to weigh what
10 are the other possible interpretations of the facts?

11 So I've gone about looking at this in the way
12 what I think of as the three models of how the evidence
13 could be interpreted, and I'm trying to determine -- I'm
14 trying to falsify any of those models.

15 To the extent the government started telling
16 me that there was no market for this material, it was
17 never used, it was all junk from the beginning, I think
18 I've falsified that model. It's not true. There was a
19 market for this stuff. It was a limited market. He did
20 use some of it. He used a little of it. He did sell
21 some of it. It was small in proportion to what he took
22 into the site. So the government's contention otherwise
23 is false.

24 Your argument that it was an arrangement for
25 use of the entire quantity of Pyranol shipped and that

1 was how it was understood by GE remains a potentially
2 viable model, and it has to be tested against the
3 alternative model which is that this was a case in which
4 GE well understood and intended that this stuff would be
5 gotten rid of through an arrangement in which large
6 quantities of it would be taken and only certain
7 quantities of it could be used in another product, and
8 the balance would be disposed of and that that's what
9 they understood and intended.

10 Those seem to be the two remaining viable
11 models, and I'm trying to look at that, and on
12 determining which of those two models is right, it's
13 very important to me to know what was the quality of the
14 Pyranol being shipped. Because if it was very highly
15 contaminated Pyranol -- because, again, here's how I'm
16 thinking of it tentatively. To the extent there was a
17 market for Pyranol for a use that didn't involve
18 disposal, because there might have been a market for use
19 as a dust suppressant or a defoliant, but those are
20 disposed of within the meaning of CERCLA. You use it as
21 a defoliant. You put it on the ground as a dust
22 suppressant. You are disposing of it. So those -- what
23 may have been a use for those purposes, but those are
24 disposal uses.

25 There was a market for the use of Pyranol and

1 it was as an Aroclor substitute. An Aroclor
2 substitute -- it couldn't be substituted for use as a
3 dielectric fluid because if it could, GE would have done
4 it, and the fact that it didn't suggests that there
5 isn't a market for that. So then you ask what is the
6 market for this? It is a market as an additive to
7 certain kinds of paint and paint-like products as an
8 elasticizer or an extender, and the market for that is
9 when it can substitute for Aroclor.

10 Aroclor sells for between 3 and \$4 a gallon.
11 Pyranol is being acquired by Mr. Fletcher for 1/50th of
12 the price of Aroclor, less than 1/50th of the price, and
13 so what can we say about that, about the understanding
14 about what GE understood about this product? That's an
15 important fact to me.

16 MR. BIAGETTI: Yes.

17 THE COURT: It's an important fact to know
18 something about how contaminated was this product? It's
19 important to know what was the market for Pyranol as an
20 Aroclor substitute? It's important to know what did GE
21 do with the other Pyranol that it didn't give to Mr.
22 Fletcher? Because if there were any kind of significant
23 market for this product and GE -- GE, because they are a
24 sophisticated business company, can understand -- if
25 there's no one else who's willing to buy Aroclor

1 contaminated into Pyranol, Aroclor-contaminated Pyranol
2 -- excuse me, Pyranol contaminated, for anything more
3 than 1/50th of the price, and even at that price we
4 aren't able to find anybody other than Fletcher, the
5 market for this is pretty limited? And why is it?

6 If you are able to sell Aroclor at 3.94 a
7 gallon, but you can only sell the contaminated Pyranol
8 at less than 1/50th of the price, it's because it can't
9 all be used. Only some small amount of it can
10 potentially be productively sold as an Aroclor
11 substitute, otherwise the price that GE would be able to
12 charge for the Pyranol would be much higher. It's just
13 a matter of basic economics. Or there would have to be
14 some kind of substantial treatment of the Pyranol in
15 order to make it viable as an Aroclor substitute,
16 otherwise the price would be different. It's basic
17 economics.

18 MR. BIAGETTI: I respectfully disagree, or the
19 testimony of the GE witnesses is true. You heard Mr.
20 Abbe say yesterday, I thought it was wonderful that we
21 found an exceptional situation, somebody who had figured
22 out a way to use scrap Pyranol. This was -- they tried
23 to find out this. This was the only one they found.
24 And if that is true, and whatever the fancy word is
25 monopsony, you know, market of one buyer, then it was a

1 great price that GE was getting because they didn't have
2 anybody else to buy it.

3 THE COURT: Yeah, but there are two competing
4 interpretations. One is that GE understood exactly from
5 that deposition excerpt I had, that he would use some of
6 it and get rid of the rest of it. That's what one of
7 those witnesses testified to he understood, and your
8 view is they understood they would use all of it. And
9 that's what I'm trying to evaluate, those two competing
10 models, because I've rejected the government's model
11 that he never intended to use any of it. It was just a
12 crazy thing where he tried to buy it and maybe he hoped
13 he had some use for it. The government's own evidence
14 undermines that view. He was clearly using it for some
15 purpose, some of it, and the question is did GE
16 understand and intend at the time of the transaction
17 that he was going to use all of it, or did GE understand
18 and intend, as one of the witnesses testified, they'd
19 use some of it and the rest of it they would dispose of.

20 MR. BIAGETTI: He said it could be disposed
21 of. Could I make just two points about the letter and
22 your comments and then I realize we need to take a
23 break. If you are going to, Judge, infer from the
24 letter, Defendant's 15, anything about the quality of
25 the Pyranol that was actually shipped to Fletcher,

1 that -- I don't need Mr. Clark for that. That's defined
2 by Fletcher's own actions. Remember the three years
3 that Fletcher is talking about here are the Varnum
4 years, the years when Mr. Hooper says we were testing at
5 Fletcher because we knew Varnum was going to say if you
6 take it you are testing at GE.

7 THE COURT: See if you can help me with this.
8 I may have the sequencing of this wrong. What we had
9 was the Metevier years; right?

10 MR. BIAGETTI: Until '64.

11 THE COURT: And Hooper's testimony on that was
12 we took it all and Metevier made allowances for the bad
13 barrels.

14 MR. BIAGETTI: Occasionally bad barrel.

15 THE COURT: I don't know about occasional but
16 Hooper testified quite a lot of it was quite low
17 quality. That's my recollection.

18 MR. BIAGETTI: But some was thin, which we
19 knew Fletcher could sell to Webtex. Go ahead.

20 THE COURT: In any event, I will get into that
21 in the closing argument part.

22 And then there were the Varnum years, and a
23 problem started developing because Varnum wouldn't cut
24 deals and made him pay for every barrel, which caused
25 him to stop paying, which caused this letter to be

1 generated, which caused testing at Monsanto, which
2 confirmed that a lot of the stuff was junk, and then the
3 relationship of the testing went on after that. Do I
4 have the sequence wrong?

5 MR. COWAN: Yes, your Honor, you do,
6 respectfully.

7 THE COURT: Okay. That's what I want to know.
8 You're saying that before this letter was written, there
9 was testing.

10 MR. BIAGETTI: Oh, yes.

11 THE COURT: That doesn't make sense to me
12 because then why would he take -- if he was looking at
13 it and taking it, why wouldn't he just disclaim the
14 barrels right at the site?

15 MR. BIAGETTI: And that's why he's lying.
16 That part he is lying about it.

17 THE COURT: Wait, wait. Just tell me, do you
18 agree with them that I have the sequencing wrong and
19 that the hydrometer testing all occurred before this
20 letter was written?

21 MR. FLYNN: I agree, yes. When Varnum took
22 over, the testing started. Varnum retired in '66, and
23 what we have here is we have testimony that non-
24 Fletcher drivers were picking it up. Whether they were
25 hired by GE or Fletcher, I admit is a confusing point,

1 but they were non-Fletcher drivers. We have that pretty
2 clear.

3 THE COURT: Wait, wait. I got the Metevier
4 part down.

5 Varnum, what I thought happened was we had
6 non-Fletcher drivers taking. There was no testing of
7 what we were getting. We were getting a lot of junk.
8 We wrote a letter and didn't pay and wrote a letter to
9 complain about it. Then we started sending our own
10 people there, and when we did, we tested it.

11 MR. FLYNN: The sequence is a little different
12 in our understanding. During the Metevier years our
13 understanding is the same as your Honor's. The bad
14 stuff was compensated by better stuff. Then Varnum took
15 over and he said no more of that. So at that point
16 Fletcher drivers went in and did the testing.

17 THE COURT: When were the non-Fletcher drivers
18 coming?

19 MR. FLYNN: That's what we are coming to, your
20 Honor.

21 THE COURT: You're saying that came after the
22 Fletcher drivers?

23 MR. FLYNN: Yes. Fletcher drivers started
24 testing. Varnum retired in '66. This letter is '68.
25 It talks about the preceding --

1 THE COURT: Oh, okay. That makes sense.

2 MR. FLYNN: This paragraph makes perfect sense
3 if you --

4 THE COURT: Wait. Let me speak it back to you
5 to save time. If I understand your position, it is then
6 that Fletcher was correct that insofar as he was saying
7 that our drivers aren't bringing the stuff anymore. He
8 was wrong that it was your guy when in fact it was his
9 independent contractor who wasn't doing testing and
10 therefore was taking everything that was submitted.

11 MR. FLYNN: That's our view.

12 THE COURT: So there are three periods that
13 matter prior to this letter. Period one is Metevier.
14 Period two is Varnum in which there was hydrometer
15 testing. Period three is post-Varnum, independent
16 contractor trucker, no testing, taking everything. Do
17 you agree or disagree with that sequence?

18 MR. COWAN: If I may, Judge?

19 THE COURT: Yes.

20 MR. COWAN: Respectfully, I disagree for this
21 simple evidentiary fact. There's no evidence of that.
22 What the evidence is is that, if his Honor believes Mr.
23 Hooper, that in the Metevier years where there were thin
24 drums, his description, and occasionally some drums he
25 didn't know what was in them, and we don't know either.

1 Mr. Metevier would, as a good customer does, make up for
2 it. Then Mr. Hooper told us uncontroverted, when Mr.
3 Varnum took over that stopped. We had to test every
4 drum.

5 THE COURT: I think they agree with that. So
6 far you are in agreement with them.

7 MR. COWAN: We agree with them, but then the
8 government has made a leap that there is no evidence in
9 this case that they can point to. They suggest that
10 that has changed when Mr. Varnum left, but Mr. Hooper
11 said that became the new policy and practice.

12 THE COURT: All right. I will go back and
13 read the testimony. I will ask my reporter to e-mail me
14 an unedited transcript of Hooper's testimony. I will
15 read it this afternoon, and the other witness -- what
16 was the witness's name?

17 MR. FLYNN: Whitney. Actually this witness,
18 too, was describing a truck size that was bigger than
19 the truck that --

20 THE COURT: The 70-barrel trucks which are not
21 what was being driven. So there is a lot to support the
22 idea that there was a third phase involving larger
23 trucks, and I will just go through the evidence on that
24 point.

25 MS. FISKE: And you will hear, your Honor,

1 that Mr. Hooper testifies that he doesn't remember ever
2 going after Mr. Varnum had retired. He never remembers
3 going there.

4 THE COURT: I will look at the testimony on
5 that point. I now have the temporal sequence correct.
6 So your view is the only evidence to support the view
7 that from the start of Varnum till this letter, that
8 Fletcher was picking the stuff up on his own and testing
9 it on his own. There's no evidence to support his
10 conclusion that there was a period post-Varnum where
11 Fletcher was not testing.

12 MR. COWAN: That's right. That's our
13 position, and our position with due respect to Ms.
14 Fiske, Mr. Hooper has testified that he made trips to GE
15 to purchase or collect materials purchased from GE for
16 Mr. Fletcher into the seventies, and he has said -- you
17 put it all together, Judge, Varnum comes on line, we had
18 to test every drum. Most importantly, your Honor, he
19 said when our tests determined that they didn't have in
20 those drums what we wanted, they stayed in Hudson Falls
21 and Ft. Edward. They never left.

22 THE COURT: I understand. It's just a
23 question of did that continue -- the only dispute
24 between you on this point is whether after Varnum left,
25 there was a third phase in which Fletcher drivers were

1 not picking up the drums. There's no evidence that
2 Fletcher had a 70-drum truck.

3 MR. FLYNN: Correct.

4 THE COURT: Your witness is telling about
5 70-drum transports, and there are some other references
6 to this contractor in the testimony, and I will have to
7 weigh that against what you are saying that the evidence
8 simply won't support that conclusion.

9 MR. FLYNN: That's right. Your Honor, I just
10 want to clarify the Hooper testimony that counsel is
11 referring to. That was tied into his memory about his
12 gallbladder where he was subsequently thinking maybe it
13 wasn't 1970s, and that will be in the trial transcript.

14 THE COURT: Yeah, I will look at all the
15 evidence. You can argue it in closing argument. That's
16 one point on which you guys differ, and I'm glad that I
17 got the chronology clarified so I can evaluate the
18 competing evidence on that point. Perhaps because of
19 the difference between you, I ended up being somewhat
20 confused about the exact sequencing of that third phase,
21 and I had tried to reconcile it by saying that third
22 phase must have come after this letter.

23 Let me just clarify. After this letter do the
24 parties agree there continue to be shipments of Pyranol
25 to the site? Does the government say there were

1 shipments?

2 MS. ROWLEY: No, we say the shipments stopped
3 in 1967.

4 THE COURT: Do you say there were shipments
5 after that date?

6 MR. BIAGETTI: Yes.

7 THE COURT: That's the thin. I think we have
8 disagreement about that. So you say there were
9 continued shipments of Pyranol after this letter; right?
10 So you are going to have to marshal your evidence on
11 that point to support that. Do you have shipping
12 records or payment records that support that?

13 MR. BIAGETTI: No.

14 THE COURT: What's the evidence you have that
15 there were continued Pyranol shipments after that?

16 MR. BIAGETTI: Recollections of the witnesses,
17 Hooper from Fletcher's side, Abbe on the GE side.

18 MR. FLYNN: Your Honor, we have admitted
19 yesterday or this morning part of Siebels' affidavit
20 that specifically lists GE's view of when the last
21 shipments are, and it doesn't go into 1968.

22 THE COURT: All right. But that doesn't mean
23 that they can't today argue something different. At
24 most that would be an admission. It doesn't mean that
25 they are barred from saying, well, we've got a better

1 set of records now and we understand something
2 different.

3 MR. BIAGETTI: Those were records of amounts
4 that were past due which were the amounts through
5 November '67.

6 THE COURT: It's kind of interesting that they
7 are the ones saying we ship more to it than you guys
8 think, but I will evaluate that.

9 MR. BIAGETTI: Again, my very last point, the
10 second thing I think I heard your Honor saying he may
11 take this stuff that this witness speaks to directly,
12 and that is, whether or not it can be used -- not can be
13 used, but whether or not it's enough for the U.S. to
14 meet the burden that GE receiving this letter meant that
15 they must have known that disposal by Fletcher was
16 substantially certain to occur, and so this man's
17 testimony, Mr. Abbe's testimony, in fact, that GE
18 disbelieved --

19 THE COURT: I'm inferring that GE knew what it
20 was shipping to Fletcher. It knew what it was shipping
21 to Fletcher and the quality of the Pyranol. I think it
22 attributes a kind of a lack of diligence to GE that is
23 just untenable to suggest they had no idea what was in
24 the drums they were shipping to them. It knew what was
25 in the drums it was shipping to them. The dispute is

1 about what was in the drums that they were shipping, not
2 what did GE know. Whatever was in those drums, it knew
3 what it was shipping.

4 MR. BIAGETTI: We believe what GE knows and
5 believes about what was in those drums is central. What
6 was in them is probative of that.

7 THE COURT: Do you contend that GE didn't know
8 what was in the Pyranol that it was shipping to
9 Fletcher?

10 MR. BIAGETTI: No. GE knew it was Pyranol
11 that did not meet its very demanding --

12 THE COURT: It knew more than that. It
13 knew -- to the extent it was contaminated with stuff it
14 knew what was in it because its people were collecting
15 it and it knew what was in those drums, and so I'm
16 asking what was in the drums because it's fair to say
17 that GE knew what was in the drums. So establishing
18 what was in them -- it's funny how you can't seem --
19 people can't seem to understand my thinking.

20 MR. BIAGETTI: The case is about whether or
21 not GE had a reasonable belief that what was in the
22 drums was being used, and, again, GE has no burden
23 there.

24 THE COURT: GE knowing what was in the drums
25 bears on the question of whether it had a belief that --

1 what it was being used for or disposed of because if it
2 was all junk and GE knew it was junk, then GE's claim
3 that it thought it was being used is less credible.
4 Can't you see that?

5 MR. BIAGETTI: One man's junk is another
6 man's --

7 THE COURT: You are missing the point. I've
8 got to break for lunch. You are going to press me into
9 a position that you're not going to be comfortable with
10 here. You're missing the point. The point is it's
11 highly relevant to know what was in the drums that were
12 going to Fletcher because the argument that GE
13 understood what it was shipping to Fletcher is much less
14 strong if what was going to Fletcher was a collection of
15 chemicals that contained Pyranol, all other kinds of
16 waste, water, debris, other contaminants that made it
17 unusable for any purposes, and it was so contaminated
18 that GE knew that when it shipped the Pyranol to
19 Fletcher; that it claimed that it thought Fletcher was
20 using it as an Aroclor substitute is less credible.

21 The letter from Fletcher complaining that it
22 was getting junk, now that it's admitted, is relevant
23 not just to establish what GE gleaned from the letter,
24 but is relevant to establish that what GE was giving
25 them was junk, and that is relevant regardless of what

1 GE gleaned from the letter. Even if GE assumed that it
2 was posturing, if in fact it's evidence that what was
3 being given was junk, that is relevant in proving what
4 GE's intent was. When it sold something, it knew what
5 it was selling.

6 Unless you have an argument that GE didn't
7 know what it was selling, it is relevant to know what GE
8 was selling in determining what the argument was. If GE
9 knew it was selling junk that couldn't be used even in a
10 limited market that exists for Pyranol and Aroclor
11 substitutes, that it knew that what was being purchased
12 was being disposed of, and that was the nature of the
13 arrangement, that some would be used and some would be
14 disposed of.

15 Your argument is it knew and understood that
16 all of it would be used and none of it would be disposed
17 of. I have to test that argument against the
18 government's claim, not under its original theory, but
19 under this modified theory, have they proved more likely
20 than not that while some of it was being used, the bulk
21 of it was being disposed of, and GE knew that at the
22 time, and it intended this relationship to be an
23 arrangement for disposal in which the buyer would gather
24 the benefit from taking the best of it and using it and
25 discarding the rest.

1 That's the theory that is tested -- I will
2 test and determine whether the government has proved
3 that theory by a preponderance of the evidence, and it
4 is highly relevant to know what was actually in the
5 drums. That's one of the key pieces of evidence in my
6 mind in determining what the arrangement was, because if
7 it was an arrangement to sell junk that couldn't in
8 substantial part be used, then it was an arrangement to
9 dispose of it. If it was an arrangement in which this
10 Pyranol was, as you were suggesting, only contaminated
11 with minuscule quantities of contaminants that could
12 easily be filtered out and it could be sold as Aroclor
13 or an Aroclor substitute, then the case is much better,
14 but you would encounter problems.

15 If that were true, GE would be able to get
16 more than 1/50th of the cost of Aroclor to do it, and if
17 that were true, we'd have trouble reconciling all the
18 Hooper testimony about the varying qualities of the
19 drums. If that were true, we'd have trouble with the
20 Monsanto testing. If that were true, we'd have trouble
21 with the Fletcher letter. If that were true, we'd have
22 trouble with the testimony from the witness who said,
23 from GE, that we thought he used some of it and could
24 dispose of the rest of it.

25 You know, the government could have started

1 out with a more narrow-focused case, but I think it's
2 encompassed in the case the government has presented,
3 and to the extent the government's case remains viable,
4 that's the case, and I'm trying to test it against the
5 argument you are making.

6 MR. BIAGETTI: One sentence. GE's argument,
7 respectfully, Judge, is that what it knew it was sending
8 to Fletcher was useful for the purposes that Fletcher
9 and Webster put it to, and the expert testimony, which
10 you may not have had a chance to review that obviously,
11 is unanimous on that point.

12 THE COURT: And I'm agreeing that some of it
13 was. To the extent that -- all the government has to
14 prove is that some of it wasn't, more likely than not,
15 and that GE understood that, and that therefore it was
16 an arrangement for disposal to that extent, and that's
17 where you guys are -- we just aren't able to address
18 each other. I don't understand it because that's the
19 theory that you need to be trying to address.

20 Because I have said, haven't I, from the first
21 day, to the extent the government tried to tell me
22 before the trial started that this stuff -- none of it
23 was useful, the government is wrong, okay? That's out
24 of the case. I'm not even considering that anymore,
25 because the government's own witnesses say that it was

1 used and it was sold, some of it. So you're right about
2 that, but you keep repeating that statement as if it
3 decides the case, and it doesn't.

4 MR. BIAGETTI: I'm sorry.

5 THE COURT: The statement has to be GE
6 understood that all of the Pyranol that was shipped to
7 Fletcher would be used and not disposed of, and the
8 government can't prove to the contrary. That's your
9 case.

10 MR. BIAGETTI: Yes.

11 THE COURT: And I ask the government, can the
12 government prove to the contrary that at least some
13 quantity of what was shipped could not be used, GE
14 understood that at the time and intended its
15 arrangements to be to that extent for the Pyranol to be
16 disposed of. That's the way the case should be being
17 tried.

18 MR. BIAGETTI: We're in agreement that that's
19 the issue.

20 THE COURT: All right.

21 (Luncheon recess taken at 12:50 p.m.)

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1 C E R T I F I C A T E

2

3 I, Diane M. Churas, do hereby certify that the
4 foregoing transcript is a true and accurate
5 transcription of the within proceedings, to the best of
6 my knowledge, skill, ability and belief.

7

Submitted: 2/3/09

8

9 /s/ Diane M. Churas ____
DIANE M. CHURAS, CSR, CRR

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